



Case and Comment

THE LAWYER'S MAGAZINE

VOL. 21

AUGUST 1914

No. 3

Inefficiency of the Copyright Law as Affecting Remedies

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I N the enactment of the present copyright law which went into effect on July 1, 1909, the various interests which are affected by it were in consultation; and it was intended to express the best thought of the representatives of all these interests, as well as of Congress.

In practice it has proven unsatisfactory in some respects. It has already been amended by the so-called "Townsend bill," which refers to two new classes of copyright works; namely, motion-picture photoplays and motion pictures other than photoplays; as well as by the act of August, 1912, which enlarged the measure of recovery in cases of infringement after *scienter*. A sufficient time has elapsed to indicate that it does not adequately meet the just expectations of its authors; and, in some

directions here to be pointed out it appears to be insufficient, at least so far as the prescribed remedies against infringers are concerned.

The former law provided that the grant of copyright must precede publication; the present law, on the other hand, requires a publication containing "imprint" as the initial step, which must precede the application for a registry of the copyright. The supposed gain in this change is of doubtful value.

A mere publication of a copyrightable work which contains the prescribed imprint thereon now secures a *prima facie* copyright for it; provided that such imprint be affixed to each copy of it offered for sale in the United States. The law then has the additional requirement that after publication there shall be "promptly" deposited in the copyright office two complete copies of the best edition thereof then published. No action or proceeding shall be maintained for infringement of copyright until the requirement with respect to such deposit "shall have been complied with."

That, so far as the remedies are concerned, the copyright owner derives no advantage from the present law over the former statute, was brought out in the recent case of the "Times Publishing Company" against the "Sun Publishing Company" (which went all the way to the United States Supreme Court), in which injunctive protection was denied to the complainant because he had commenced his action before he had filed his copies. The instance is a striking one, in view of the fact that the deposit of copies was in fact made at the earliest possible moment, although the alert defendant had been able to make its own use of the copyrighted matter in the trifling interval of time between publication and filing. The case, it will be remembered, was the one involving the printing of the news of the Stevenson story of the discovery of the South Pole, for the privilege of an exclusive publication of which the "Times" had made a liberal payment. I am not now concerned about the question as to whether or not "news" as such is copyrightable. I am only pointing out the fact that, assuming such to be the case, the statute is inadequate, and affords no advantage over the corresponding provisions of the former one.

But there is a much more serious aspect of the inefficiency of this particular provision of the law. In § 13 it is provided that if the two copies are not "promptly" deposited, the Registrar of Copyrights may give notice to the proprietor of the copyright to deposit them, and that, if then within three months that be not done, a moderate fine is imposed and the copyright becomes void. Meanwhile the publisher has distributed his edition, and is likely to enjoy a practical monopoly to which he may possibly not in the end prove himself entitled, because the use of the statutory "imprint" will protect him against the reproduction of the work by the general public and by all those who do not know of the possible invalidity of his claim.

If the provision of this section were that these consequences were to follow a failure to file, without prior demand, the two copies within (say) such three months (thereby in effect construing

"promptly" to mean three months), this provision might be defensible. But as the law stands, the obvious thought is, How is the Registrar of Copyrights to know of the existence of the many publications with imprint, which are being constantly put out, so that he might in any particular instance have the information enabling him to give the "notice" above required? The present law affords instant protection upon mere publication with imprint; how is the Registrar to know of all copyrights thus claimed; or how is the public to be informed that the copyright requirements have been completed?

The practical result has been that unscrupulous and generally irresponsible parties have put out copyright claims without intention of filing copies,—either because they are really not entitled to copyright for one reason or another; or because they wish to save themselves the trouble or cost of filing. True, there is a provision which makes it a misdemeanor to insert an imprint upon an uncopyrightable article, and which punishes anyone who shall knowingly issue any article bearing imprint which has not been copyrighted in this country; but this provision need have no terrors for the unscrupulous claimant, because he may in any event wait until three months after the notice from the Registrar of Copyrights before he need file his copies; and such notice, as I have already pointed out, the Registrar is neither obliged to give, nor is he likely to have knowledge of the necessary facts to enable him to give it.

Thus, recently, in the matter of the well-known picture "September Morn," all sorts of irresponsible peddlers got out unauthorized reproductions upon which they boldly placed a copyright imprint, without a pretense of any right to copyright, or any intention to proceed to acquire a registry of it.

We were very much better off under the former law, which required the filing of copies and the issuance of a copyright certificate, before a claimant was authorized to place the "imprint" upon his work. I doubt seriously whether the technical convenience which the present law promotes, in that it grants copyright

immediately upon publication, outweighs the disadvantages.

Indeed it seems to me to be a matter worth serious consideration whether the copyright law, in analogy to the trademark law, should not provide for an examination by the copyright office, with a view of ascertaining whether or not a particular claim for copyright conflicts with one already issued, before a certificate of copyright be granted; and which shall provide for notice to conflicting claimants, and the determination of what are technically called "interferences." For that purpose it may not be inadvisable to give all copyright claimants an *ad interim* copyright for (say) a period of three months (such as is referred in § 21 of the present act, in connection with foreign publications), for the purpose of providing a sufficient period within which conflicting claims might be determined. By publishing a journal containing reproductions of such copyrightable articles as are capable of pictorial reproduction (including, as to books or other literary or musical composition, only their titles), a ready source of information to the general public would be provided, by means of which notice of all claims for copyright could be made accessible to interested parties.

This thought is suggested by the recent case in the second circuit, "*Gross v. Brown*," the particulars of which may not be without interest. A certain photographer had pictured a young girl in the nude, in a particularly artistic and striking pose, and with fine shade effects and an interesting expression. The com-

pleted picture was copyrighted, and then the copyright (*i.e.*, the sole right of publication) was sold for a sum of money to the plaintiff, Gross. Subsequently, and after an interval of several years, the photographer used the same young woman in a like pose and in a same state of

undress, making changes only in the expression and contour of the face and in some minor details. On the theory that this second photograph was neither a photographic reproduction of the first, nor a mechanical copy of it, but that it was an "original" production, he again obtained copyright; and he sold this copyright to a dealer other than Gross, from whom the defendant, Brown, thereafter purchased a quantity of pictures for public sale. Litigation ensued, and on motion for a preliminary injunction the court held that

the second production was an infringement of the first one, notwithstanding the fact that it was made by original process; holding that the conclusion was inevitable that there was an intended purpose to produce again that combination of artistic effect and intellectual conception and general pose which together made up the very beautiful first picture.

The defendant, Brown, knew only that he was buying a work which was copyrighted; there was nothing to warn him that the copyright was invalid. Nor had his vendor acted in bad faith; even the photographer insisted that he is not chargeable with any violation of the law, claiming to have acted in good faith in copyrighting his second picture, because of the fact he had again made an original



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production. In that belief he was supported by eminent counsel, as well as by the expert testimony of leading artists; so that a prosecution under the penal section of the statute (which refers to false claims of copyright) would hardly lie. The point I make is that if the issuance of a copyright for the second picture had been a matter of examination and determination by the Registrar (such as obtains in trademark matters), it is not likely that a copyright would have been issued for the second picture.

Taking up now the provisions of the law with reference to the redress which it seeks to afford to the copyright owner for infringement, we find that here, too, the statute is artificial, uncertain, and inefficient. Limiting myself, for the purpose of this article, to the case of a photograph, we find the following provisions: That in case of infringement (in addition to injunctive relief, and the forfeiture of the alleged infringing copies and the plates from which they are made) the copyright owner is entitled to recover indemnity as follows: The infringer "shall be liable to pay" to him such damages as he may have suffered from the infringement as well as the profits which the infringer shall have made from it; or, "in lieu of actual damages and profits, such damages as to the court shall appear to be just."

The statute then proceeds to state that the court, in assessing such damages, "may in its discretion allow the sums as hereinafter stated." This refers to a subsequent section which provides that in the case of a photograph it shall be "\$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees."

The statute further provides that in the case of a newspaper reproduction of a copyrighted photograph, "such damages" shall not exceed \$200 nor be less than \$50; and that such damages shall not in any other case exceed the sum of \$5,000, nor be less than the sum of \$250, and shall not be regarded as a penalty. By an amendment of the law (of August 24, 1912) a clause has been added, to the effect that this limitation, as to the amount of recovery, shall not apply to

infringements which occur after actual notice to a defendant of plaintiff's rights.

It is, of course, a very great improvement in the administration of the law that the former provisions for the recovery of penalties and their division with the government have been abolished, and that these actions no longer are in the nature of *qui tam* proceedings; and it is a distinct gain that the statute now applies the rule for estimating damages to all infringements which a defendant has at any time had or made. The former law, which confined the *per capita* award to such copies only "as are found in the possession of a defendant," worked a very great hardship ever since the decision of the case of *Bolles v. Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94, in which the United States Supreme Court gave the strained construction to that expression, that the penalty attached only to such copies as were actually found in the possession of the defendant at the time of the commencement of the action for the recovery of such penalty. The effect of that ruling was that the greater the thief, the easier his escape. If he had managed to dispose of his unlawful output before he was discovered, his victim was left practically without remedy.

But while the new law attaches this \$1 a copy award to every infringing copy which a defendant is shown to have made or possessed at any time, it leaves the owner's remedies nevertheless in a very uncertain and unsatisfactory shape.

Of course he may in any and every event recover the damages which he can actually prove himself to have suffered, as well as the profit which the defendant has made; and in expressly declaring that the recoveries shall not be deemed "penalties" it opens up the door to the obtaining of the requisite proof out of the mouth and records of the defendant himself. And perhaps, after all, fault may not be found with a law which would limit a plaintiff's recovery to these two elements. It is hard to understand why a copyright owner should be put in a better position, as against the wrongdoer, than any other kind of claimant. The true conception of the intent of every remedial law is, that it shall furnish "indemnity" only for a wrong done. And

if a copyright owner recover all of his damage, and recover (by way of smart money) the profits of a defendant (which the latter ought not to have), he might well be satisfied.

When, furthermore, it is a case where the infringement was with knowledge and deliberation, the law affords the further protection and satisfaction of providing that the defendant can be held criminally liable. This means no additional compensation to the copyright owner; but the law is not concerned about that so much as it is that, after the plaintiff has had his indemnity, the state shall be protected against wrongdoing.

There are, however, a considerable number of cases constantly arising in which it is not practical, even if possible, to ascertain or to determine "actual damages" for an infringement. It is, I take it, for these cases that the law provides the alternative relief that "in lieu of actual damages and profits" the infringer shall be liable to pay "such damages as to the court shall appear to be just." Whether that is an original, discretionary power of the court, entitling it to determine in every instance whether or not the plaintiff shall be limited to actual damages and profits, seems doubtful. Whenever, however, it undertakes to assess such alternative damages, then the general provision that they be such "as to the court shall appear to be just," is sought to be limited by other provisions. It is here where the principal uncertainty and indefiniteness of the law become apparent.

It seems to me to be inconsistent to say in one place that the defendant shall pay such damages "as to the court shall appear to be just," and then, elsewhere, that they shall be for an amount between certain arbitrary fixed maximum and minimum limits. Taking the case of a newspaper infringement of a photograph, a just award might, under all the circumstances of a given case, be less than the prescribed minimum of \$50, or it might be much more than the maximum of \$200; quite irrespective of the edition of the infringement which, at \$1 per copy, is intended to furnish the basis of the assessment. And so the courts have come to construe the law as giving it

power in any case, in which it has been determined to make the alternative award of other than actual damages and profits, to permit it to fix as measure of indemnity such sum as it may consider that the defendant should in justice pay; the language of the statute being that it "may in its discretion" fix the allowance at the rate of \$1 per copy made, etc. But, on the other hand, the damages cannot in any such case be greater than the maximum amount named in the statute, nor less than the minimum amount. Thus, though only a nominal amount of the copies of the infringement may have been issued, nevertheless the minimum award would have to be made, while, no matter how great the edition which had been distributed, more cannot be given than the prescribed maximum. Between these extremes the court's discretion is absolute, excepting as it is limited by the size of the "edition."

I do not believe such to have been the legislative intent. The fairer and more consistent rule should have provided that, within the limitations of this maximum and minimum, the infringer was to have his \$1 a copy for every copy to which the penalty would attach; in other words that if, for instance, 4,000 copies had been issued in a case where the maximum assessment was \$5,000 and the minimum assessment \$250, a full \$4,000 (and not any lesser sum, down to \$250) was intended to be the award.

But the principal defect of the provision of the statute is that it leaves it entirely uncertain as to how it is to be determined in any particular case whether a plaintiff is to have the "alternative" award of statutory damages, in lieu of actual damages and profits. It would seem that the plaintiff might declare his election when bringing suit; if he asks for the statutory allowance, he should be held to it under his pleadings. On the other hand if, when asking for "actual" damages and for the defendant's profits, he finds himself in a position of being unable to prove actual damages, the court might come to his aid by granting him the alternative relief.

My own experience permits me to suggest that the best method of compensation would be to provide that a plaintiff

should have such damages as he could prove, as well as all profits made by the defendant out of the infringement; and that his recovery should not, however, in any case be less than (I should say) \$200, with costs and counsel fee; with a proviso that in any case in which it shall be adjudged upon the trial that the infringement had been made with knowledge of the plaintiff's rights, such recovery shall be multiplied by three.

The most indefensible provision of the statute, however, is the one which limits the recoveries against newspapers which are found guilty of the infringement of the copyrighted photographs, to the respective trifling sums of the minimum of \$50, and the maximum of \$200. This is special and class legislation of the most vicious character; the practical result of which is that a magazine or a newspaper can destroy the most valuable photographic copyright at no greater risk under any circumstances than a judgment for \$200. So far as reputable newspapers are concerned, I have always found their responsible publishers and proprietors to be ready to deal fairly and justly with every interest; the great newspapers are in the habit of respecting the rights of others; and they do not need this special legislation. On the other hand, it is no fanciful picture to conceive that there are, here and there, newspaper and magazine owners of such irresponsibility and lack of business integrity, that they would not hesitate to infringe at the risk of the trifling cost which it might involve, if they could not obtain what they wanted by negotiation.

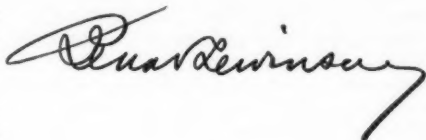
It is true that the statute provides for a prosecution against anyone who pirates "knowingly and for profit." A newspaper or magazine publisher might readily enough be held to have done it "for profit;" but the cases are rare indeed where it can be established beyond that reasonable doubt which a criminal prosecution imposes, whether a particular publication was made "knowingly."

There are anomalies in the statute which it is hard to reconcile. Thus it is

provided in § 15 that copyright protection cannot be extended to books unless the type is set within the limits of the United States or from plates made there, and that such protection will also be denied to illustrations or to separate pictures made by lithographic or by photo-engraving process, unless so made within our own country (with certain stated exceptions). This qualification as to the place of manufacture does not, however, apply if the very same pictures are made from wood blocks, or steel, or copper plates; though it is hard to understand upon what theory that distinction should be made.

Then, again, by § 18 it is provided that the year of the securing of copyright must form part of the "imprint" in the case of printed literary, musical, or dramatic works. Such date is not required in the case of other copyrightable matter. This discrimination, too, is hard to understand, since care has been taken to make such provision for the form and place of imprint, as to protect the subject of the copyright from disfigurement by excess of printed matter. It is a very distinct impairment of the value of a copyright notice when the date is not furnished, because it makes the task of verifying the claim of copyright in the office of the Registrar of Copyrights frequently a very serious one.

There are other respects in which the present copyright law does not seem to me to either express what must have been the intent of its promoters, nor to afford just that form and extent of protection which seem desirable. I have sought to point out in this article some of the most glaring of these deficiencies, in the hope that it might lead to remedial legislation. Any such hope would be futile without agitation.




Law and Lawyers in Shakespeare

By HON. JOHN H. LIGHT

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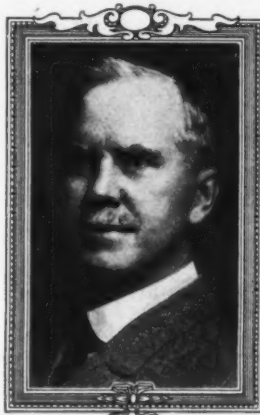


"I CONFESS," said Carlyle, "I have no notion of a truly great man that could not be all sorts of men." Shakespeare meets this test of greatness. He was potentially all sorts of men. This is manifest from his literary creations. He gave the world a typical character for every social class. We find in the pages of his dramas great kings, great statesmen, great captains, great thinkers, great doers, and men of common mold; and each one speaks in perfect character. He knew what was fitting for them to say. He spoke the language of the sea so well that many have thought he must have been a sailor. He was so familiar with all known plants that some have insisted he was a botanist. He showed such mastery in medicine, and the symptoms of disease, that others have said he was a physician. And his accurate use of legal terms and phraseology have led many to say he was a lawyer. He was apparently at home in the nomenclature of all the learned professions. He was a master of human nature, and his characters are so true to life that they have inspired constant thought. It is said there has been more written about Hamlet alone than any historic character, save Christ; and upwards of ten thousand different books, essays, and pamphlets have been written and published concerning Shakespeare's personality and work.

This is a unique record. No other name among men of letters has approached it. Hence, it is no wonder that certain learned members of the legal profession have thought they recognized in him a brother lawyer; for while every field of knowledge seems to have been his province, his knowledge of the law was remarkable.

Mr. Castle, an English barrister, in his book entitled, "The Legal Acquirements of Shakespeare," says his legal knowledge could not have been picked up in an attorney's office, but could only have been learned by an actual attendance in the courts, at pleader's chambers, and on circuit, or by associating intimately with members of the bench and bar. But, he adds, even on this supposition, it is not easy to explain his minute and undeviating accuracy in a subject where no layman who has indulged in such copious and ostentatious display of legal technicalities has ever yet succeeded in keeping himself from tipping. Lord Campbell observes that "there is nothing so dangerous as for one not of the craft to tamper with our freemasonry;" that

"while novelists and dramatists are constantly making mistakes as to the law of marriage, of wills, and of inheritance,—to Shakespeare's law, lavishly as he propounds it, there can neither be demurrer, nor bill of exceptions, nor writ of error." This is certainly expert testimony, coming as it does from one of England's learned chief justices; and I may add that others who have worn the ermine support his statement. Malone and Payne Collier both insist that Shakespeare must have been a lawyer. The poet's



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generous treatment of members of the profession is significant of his attitude toward it. It was quite the fashion to rail at lawyers, but he evidently liked them and appreciated their importance. He makes the duke, in "Measure for Measure," address Isabel as follows:

"Come hither, Isabel:
Your friar is now your prince: As I was then
Advertising, and holy to your business,
Not changing heart with habit, I am still
Attorney'd at your service."

(Act V. S. 1.)

This shows very clearly the ethical side of an attorney's duty toward his client. It is to be "holy" to his "business," "not changing heart with habit," when "attorney'd at" his "service." It is apparent here that the poet knew an attorney is obliged to be true to his client and to the court; to know and serve his client's highest interest with singleness of purpose and skill, and to keep his secrets; and inform him from time to time of the state of his business.

The following passage in *Cymbeline* shows an appreciation of the duty resting upon an attorney to master his case:

"Clo. . . . I will make
One of her women lawyer to me; for
I yet not understand the case myself."
(Act II. S. 3.)

While a client may be excusable for not understanding his case, it is the duty of the lawyer to know all of the law and the facts pertaining to it.

In "the Winter's Tale," one of the servants, in speaking of a certain character, said: "He hath . . . points, more than all the lawyers in Bohemia can learnedly handle, though they come to him by the gross." (Act IV. S. 3.)

In the preparation of briefs, it is customary to develop "the points" in a case, and support them by authorities, and it is the duty of the judge in turn to give an opinion on "the points."

The comments of Hamlet on the skull show unusual familiarity with lawyers and legal terms.

"Ham. There's another: Why may not that be the skull of a lawyer? Where be his quiddits now, his quillets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to

knock him about the sconce with a dirty shovel, and will not tell him of his action of battery?" (Act V. S. 1.)

It may be interesting to note, in view of the fact that many women are now entering the legal profession, that Shakespeare imposed the difficult duty of defending Antonio upon Portia, and Claudio upon Isabel, two of the most intellectual and eloquent women to be found in his dramas. In the trial scene, each is confronted with the seeming injustice of the rigor of the law, and each in turn made a plea for mercy which has become a classic. Shakespeare was among the first to endow women with all the intellectual and spiritual gifts enjoyed by men. He could see no impropriety in making them advocates, and appointing them to plead in a court of justice.

There are very few lawyers who really understand the true spirit and science of the law as well as Shakespeare. In "Measure for Measure" he shows an appreciation of the consequence which follows any failure to enforce the law.

"Dunke. We have strict statutes and most
biting laws
(The needful bits and curbs for
headstrong steeds)
Which for these fourteen years we
have let sleep,
Even like an o'ergrown lion in a
cave,
That goes not out to prey: now,
as fond fathers,
Having bound up the threat'ning
twigs of birch,
Only to stick it in their children's
sight,
For terror, not to use; in time the
rod
Becomes more mocked than feared:
so our decrees,
Dead to infliction, to themselves are
dead:
And liberty plucks justice by the
nose;
The baby beats the nurse, and
quite athwart
Goes all decorum."
(Act I. S. 1.)

"Ang. We must not make a scarecrow of
the law
Setting it up to fear the birds of prey,
And let it keep one shape, till cus-
tom make it
Their perch, and not their terror."
(Act II. S. 1.)

And the frailty of the jury system:

"Ang. I not deny,
The jury, passing on the prisoner's
life,
May, in the sworn twelve, have a
thief or two,
Guiltier than him they try: what's
open made to justice,
That justice seizes. What know the
laws,

fect, and that the things we do not see
we tread upon and never think of them.

It has been pointed out that the grave
diggers' speeches in *Hamlet* about the
"crowners-quest law" are really a parody
on the celebrated case of *Hales v. Petit*,
1 Plod. 253, reported and published a
few years before *Hamlet* appeared, in
1603. Sir John Hawkins suspects that



Photo by Horace K. Turner Co., Newton Center, Boston, Mass.

WILLIAM SHAKESPEARE.

That thieves do pass on thieves?
'Tis very pregnant,
The jewel that we find we stoop and
take it,
Because we see it; but what we do
not see
We tread upon and never think of
it."

(Act II. S. 1.)

He knew that all procedure dependent
wholly upon man is necessarily imper-

fect, and that the things we do not see
we tread upon and never think of them.

It appears that Sir James Hales had
drowned himself in a fit of insanity, and
the discussion by the court, in the opin-
ion, was to ascertain whether the death
was intentional or accidental, whether
he went to the water, or the water came
to him. Part of the argument runs as
follows:

"Sir James Hales was dead, and how came he, to his death? It may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? In his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die, and the act of the living man was the death of the dead man. And then for this offense, it is reasonable to punish the living man who committed the offense, and not the dead man. But how can he be said to be punished alive when the punishment comes after death?"

In the "Comedy of Errors, act IV., scene II., we find a minutely technical account of an English arrest on mesne process before judgment, in an action on the case.

Portia says:

"Let us go in,
And charge us there upon intergatories,
And we will answer theirs faithfully."

And in speaking of Sonnet XLVI., Lord Campbell says it "smells as potently of the attorney's office as any of the stanzas penned by Lord Kenyon while an attorney's clerk in Wales," and that its language and imagery are so intensely legal that without considerable knowledge of English forensic procedure, it cannot be fully understood. I will not take the space to quote it, but will explain the thought in very much the same language used by Lord Campbell.

A lover is supposed to have made a conquest of (*i.e.*, to have gained by purchase) his mistress. His Eye and Heart, holding as joint tenants, engage in a contest as to how she is to be partitioned between them,—each moiety then to be held in severalty. Regular pleadings are filed, the Heart is represented as plaintiff, and the Eye as defendant. At last, issue is joined on what the one affirms and the other denies. A jury (in the nature of an inquest) is to be impaneled to 'cide (decide), and by their verdict to apportion between the litigating parties the subject-matter to be divided. The jury are fortunately unanimous, and after due deliberation find for the Eye in respect of the lady's outward form, and for the Heart in respect of her inward love.

There are several legal publications known to have been accessible to Shakespeare, among which are Totell's Precedents, 1572, Pulton's Statutes, 1578, and Fraunce's Lawiers Logike, 1588. He appears to have been familiar with the contents of these books, and legal proceedings. This is clearly shown in "Measure for Measure" and the "first and second parts of Henry VI." These books give evidence of unusual legal acquirements, for without such knowledge they could not have been written. Mr. Castle says that "Measure for Measure" shows that he had a very accurate knowledge of the law of precontract, and that in the first part of Henry V., the proclamation of the lord was the work of a lawyer, and that an equally accurate knowledge of the law and practice of Parliament is displayed.

He showed a perfect mastery of the nomenclature of the law of real property. Let me give just two or three examples.

"Like a fair house built upon another man's ground; so I have lost my edifice by mistaking the place where I erected it."

This principle of law is not apt to be known by laymen; so, by using it, Shakespeare displayed legal knowledge commonly known by lawyers only.

And again, "If the Devil have him not in fee simple with fine and recovery, he will never, I think, in the way of waste attempt us again." He here gives us the highest estate which the Devil could hold in any of his victims.

He frequently used the language of conveyancing, and never once slipped in its use.

Best, in his work on Evidence, cites Othello (III. 3) to show that what a man (Cassio) says while asleep is not evidence against him; and Professor Beale quotes, in an article in the Harvard Review, January, 1908, as correct law on contempt of court, the Ch. Just. committal of Henry V., then Prince of Wales, for contempt against the lord of the court, *i.e.*, his father, the King, as recounted in Henry IV., Part II. (V. 2):

"Ch. Just. I then did use the person of your father;

The image of his power lay then in me:
While I was busy for the commonwealth
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the King whom I presented,
And struck me in my very seat of judgment;

Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you."

It has been held that a violation of an injunction is an offense against justice, and so punishable by a court other than that which issued the order.

Where did Shakespeare learn this? It is markedly professional knowledge, but nothing short of that would have saved him from "tipping" many times. Many writers of great gifts have made slips in their use of legal terms. Lord Campbell tells us of a mistake made by Junius, who was fond of dabbling in law, and who was supposed by some to be a lawyer, although it is now generally thought that Junius was Sir Philip Francis, then a clerk in the War Office. In his address to the English nation, he spoke of the House of Commons, and wishing to say that the beneficial interest in the state belongs to the people, and not to their representatives, he said, "They are only trustees; the fee is in us." Everyone with legal training knows that when land is held in trust, the fee, or legal estate, is in the trustee, and the beneficiary has only an equitable interest.

His lordship gives another excellent example of "tipping" in the use of legal terms. In the House of Commons, he heard a county member, who meant to intimate that he entirely concurred with the last preceding speaker, say, "I join issue with the honorable gentleman who has just sat down;" the legal sense of which is, "I flatly contradict all his facts and deny his inferences."

Shakespeare never made such a mistake, notwithstanding he constantly employed legal phraseology. How may we account for his mastery of the law? Was he a trained lawyer? I incline to the opinion that he never studied law as a science, but that he had a natural aptitude for it, and it is possible he was a clerk in a lawyer's office at Stratford for a number of years before going to Lon-

don, and that there and in London, he frequented the courts and associated with lawyers and judges. He was a perfect magician in the use of words, and acquired the largest vocabulary known to have been possessed by any man of letters. It is claimed that he used twenty thousand words. He had an experiencing mind and a matchless imagination. He was evidently capable of imbibing and assimilating more knowledge than any other man who ever lived. Men differ more in the power of acquiring knowledge than in any other way. Everyone may be said to have some gift in this respect, but only the genius possesses it in a marked degree. Shakespeare surpassed Bacon (whom some think wrote the dramas), and all others in this faculty. The fact that Bacon was college bred and Shakespeare was not does not prove that Bacon was more learned than Shakespeare. It is said that Bacon graduated from college when he was sixteen years of age, and Shakespeare graduated from the high school at Stratford when he was fifteen. I venture to say that Shakespeare had more general knowledge than Bacon.

A glance at the power of acquisition of Herbert Spencer may serve to explain the same faculty in Shakespeare. Spencer's "Social Statics" was written when he was twenty-nine years of age, and Professor John Fiske tells us that he was struck with the aptness of the historic illustrations cited in many of its chapters. The references were not only always accurate, but they showed an intelligence and a soundness of judgment, which Fiske thought unattainable save by closest familiarity with history. But Spencer assured Fiske that he had never read extensively in history, and, when asked where he got his wealth of knowledge, he did not know, except when his interest was aroused in any subject he was keenly alive to all the facts bearing upon it, and seemed to find them whichever way he turned.

Fiske tells of spending an evening with Spencer, Huxley, Hulings Jackson, and George Henry Lewes, and listened to a friendly discussion on the cerebellum. Huxley was one of the greatest comparative anatomists; Jackson was a very

eminent authority on the pathology of the nervous system, and Lewes had devoted years of study to neural physiology, and was thoroughly familiar with the history of the subject. In the conversation had, Spencer more than held his ground against the others. He met fact with fact, and brought up points in anatomy, the significance of which Huxley confessed that he had overlooked, and he had more experiments and clinical cases at his tongue's end than Jackson could muster. "It was quite evident," remarks Fiske, "that Spencer knew all they knew on the subject, and more besides, and yet he had never been through a course of 'regular training' in the studies under discussion, nor had he studied in a university, or even in a high school." Where did he acquire his mastery of the principles in question?

Fiske answers this by saying, "Probably he could not have told you himself." Fiske asked Lewes for an explanation, and he exclaimed, "It's his genius. Spencer has greater instinctive power of observation and assimilation than any man since Shakespeare, and he is like Shakespeare for hitting the bull's eye every time he fires. As for Darwin and Huxley, we can follow their intellectual processes, but Spencer is above and beyond all; he is inspired."

And it is equally true that Shakespeare's genius is the essential explanation of his accurate knowledge of the law.



Photo by Boston Photo News Co., Boston, Mass.

Shakespeare Memorial Theatre, Stratford-on-Avon.

Walt Whitman and Government

BY THOMAS B. HARNED

Of the Philadelphia Bar

[Ed. Note—Mr. Harned is a leading corporation lawyer of Pennsylvania. He was a warm personal friend of the "Good Gray Poet," Walt Whitman, and became one of his literary executors. He has done much to bring more general recognition of the poet's works. He was the editor of a complete edition of Walt Whitman's works in ten volumes].



ANY persons are under the impression that Walt Whitman is the apostle of lawlessness, and that "Leaves of Grass" is its gospel. Nothing could be further from the truth. Not only was Whitman's

life an evolution along the line of natural law, but his writings are the outgrowth of a profound artistic scheme austere conceived and rigidly adhered to. "Leaves of Grass" is characterized by an epic consistency. Its foundation is a man, moral, æsthetic, religious, emotional, meditative, patriotic. It tallies this man from the cradle to the grave. Within the concept of a single mind we discover an idealistic philosophy akin to that of some of the great Teutonic systems,—the recognition of the essential identity of the spiritual and material worlds.

Whitman does not pick or choose for beautiful things or for ugly things. To him all nature and all humanity is sacred, and is to be sung and celebrated. He does not include in his book the accepted subjects only, but all conceivable subjects; for, to Whitman, in man and in woman, in nature and in animals all processes, functions, relations, instincts, passions since God made and ordained them, are throughout pure and good. For instance, he glorifies sex as he glori-



WALT WHITMAN

fies patriotism or courage treating the one in the same matter-of-course manner as the others.

I have said that Whitman's life was an evolution. He had no university training, but he knew and became a part

of life in all its forms. He became thoroughly conversant with shops, factories, ferries, taverns, political meetings, and the vast paraphernalia of urban civilization. He knew hospitals, poor-houses, prisons, and their inmates. He passed freely in and about districts of the city which are inhabited by the worst characters. He knew evil people, and many of them knew him. Because of his unrestricted faith he even learned to tolerate squalor, vice and ignorance. He saw the good and the bad that mixed in

the same blood, and he realized that which would excuse or possibly justify a wanton life. He knew all classes,—merchants, lawyers, doctors, scholars, and writers. But the people that he knew best and liked most, who knew him best and liked him most, were at neither extreme of social preference. They were the farmers, mechanics, pilots, printers, deck hands, and in fact all those who constitute the creative background of our civilization. He made himself familiar with life, not by reading trade reports and statistics or by any extraneous or hair-splitting theory, but by living more or less with the working classes, many of whom were his intimate friends. His aim was to absorb humanity and modern life, and he neg-

lected no means, books included, by which this aim could be furthered.

Whitman's writings baffle all classification. He has been claimed by individualists, socialists, anarchists, spiritualists, and all the other ists. He believed

in law and order and in peaceful evolution. He was a Democrat in the broadest sense of the term. He had imper-turbable optimism, and believed absolutely in the virtue and intelligence of the common people. He believed that the great object of government was the preservation of liberty, and that that should be its chief object. He protested against special privileges and favors. He believed in the unrestricted freedom of commerce, and in the widest liberty of commercial intercourse among all



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nations consistent with safety. He would not take from society that which all cannot have on the same terms. He condemned the exploiting of the many for the benefit of the few. He disliked the arrogance of politicians, great and small. He declares: "That the President is there in the White House for you," and that it is "not you who are here for him." Whitman had little faith in making man good by law, yet he resented the charge that he sought to destroy institutions. He had the poet's dream that comradeship was the solution for social and political ills.

With all his faith and optimism, Whitman was never blind to many existing conditions. He believed that superciliousness rules in our literature. He felt

that there was much depravity among our business classes. He contended that the official services of America (excepting, the judges) national, state, and municipal in all their branches and departments, are saturated with corruption, bribery, falsehood, and maladministration. He saw the great cities reeking with respectable as well as nonrespectable robbery and scoundralism. He deprecated the flippancy, and swell aims of fashionable life. He regarded our so-called "best class" as largely made up of speculators and vulgarians. This is how he regarded New York society thirty years ago. And yet he hailed with joy the practical energy and even the business materialism of the time, and believed that our wealth, science, materialism, democracy, feeds the highest mind and soul. Above all, Whitman had limitless faith in the unspoiled masses whose aggregate judgment was sound. With all of his radicalism, Whitman was oftentimes conservative. This was because of his profound sense of justice. When the great Emperor William of Germany died, Whitman wrote a poem called "The Dead Emperor," which gave much offense to many of his radical friends, who could not see why a monarch should be called "a good old man—a faithful shepherd." He had a great admiration for Queen Victoria. He said that our people should be eternally grateful for Victoria's sympathy for the Union during the Civil War. "I feel for one," he said, "strongly grateful to Victoria for the good outcome of that struggle—the war horrors and finally the preservation of our nationality." He said words of defense for President Cleveland, when there was criticism because he sent a present to the Pope at the time of his

jubilee. I cite these cases to prove that Whitman believed in government, in law, in the acceptance of present conditions until we could better them. I remember in the year 1887, Sidney Morse, a sculptor from Boston, spent many days with Whitman in Camden, making a bust of him. Morse had anarchistic tendencies. The day the Chicago anarchists were hung he was very despondent. Whitman said to him: "It won't do, Sidney, we must have policemen, law, order, and such things until the human critter can get along without them, and that is a long way off. We can't throw bombs, and kill people, even if they are policemen." Morse's sadness was increased because he failed to get any sympathy from Whitman.

I have only made a few suggestions, hoping that Whitman and "Leaves of Grass" may be better known among all thinking men. He has received almost universal recognition in Europe, where he is regarded as America's deepest and broadest thinker. It is strange, indeed, that the poet who wrote so long and ardently for the glory of "these states" and for democracy should get his first acceptance largely in monarchical countries. I was with him when he died. During many talks with him during his last illness, he told me that he felt that his message was fundamental and that its meanings came out of the deepest backgrounds of history. He did not die feeling that he was understood, but he died confident that he was to be heard.

Thomas Sterned

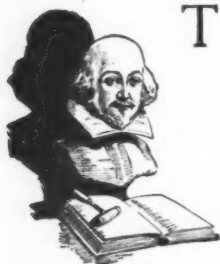


Omar Khayyám

By EBEN FRANCIS THOMPSON

Of the Worcester (Mass.) Bar

[Ed. Note.—We take pleasure in presenting this interpretation of the life and writings of Omar Khayyám by a prominent lawyer and member of the American Oriental Society, who devoted his recreative time for twenty years to preparing the only complete translation ever made in any language of the writings of Omar Khayyám. He has published "The Quatrains of Omar Khayyám" and "The Rose Garden of Omar Khayyám"]



THE popular conception of Omar Khayyám is that of a bearded profligate, cup in hand, surrounded by his companions of the Kharábát, or seated with some fair one by the side of a flowing stream. The

more intimate and serious opinion concerning the astronomer-poet seems to depend largely upon the view point of the writer, so that a most startling variety of ideas upon the subject have found expression in print. In the whole range of Persian literature, no poet holds so peculiar a position, is so widely known, or has occasioned such diverse criticism. Because of his overtopping scientific attainments, he was classed rather as a mathematician and philosopher, than as a poet, by earlier writers. He has been variously viewed as an atheist and materialist; a pantheist; a Súfi of Súfis; a free-thinker; a contemplator of the Infir-

nite; a man of learning; an orthodox Mussulman; a blasphemer; an epicurean skeptic; a profound student of human nature, and one wholly rapt in things divine. These different opinions may be accounted for in part by Omar's consistent inconsistency, arising from the various experiences and moods of a long life devoted to the contemplation of a wide range of subjects; in part by the attribution of him of views which he doubtless never entertained or expressed; in part by the bias of his critics or apologists; and largely by that quality of universality

which is an attribute of great thinkers and writers. Just as Shakespeare, of Stratford, was thought to have been a lawyer or to have had any one of a dozen occupations by those who studied him *in vacuo*, and not with relation to his times and surroundings, so Khayyám has assumed varying shapes according to the observers' view point. That he was neither atheist nor materialist is the most authoritative opinion, a view which the writer sought to demonstrate some years ago in the "Rose Garden of Omar Khayyám." Of Omar's poetical



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writings, the most widely known version, that of Edward FitzGerald, represents but a fragment, about one tenth of 1,100 quatrains attributed to him; but FitzGerald's *Rubá'iyát*, while a poem of the highest merit, is rather an adaptation and paraphrase than a translation.

The poet's great popularity is evidenced by the fact that in the last fifty years, hundreds of editions of the quatrains have been issued in more than fifty versions, and in nearly a score of languages. These versions, with the exception of that of the writer, published in 1906, are all more or less incomplete. Many of them, following FitzGerald, are decidedly free translations. The reasons of the popularity of this "King of the Wise," as he was called in the Middle East, are not far to seek. He appeals to the lawyer as he appeals to all intellectual people, but it is not alone the audacity of his thought, his intellectual acuteness, nor his remorseless logic which appeals to the trained mind. To paraphrase the poet:

"Sultan and slave alike have gone their way
With Bahrá'm Gúr, but whither none may say,
But he who charmed the wise at Nishápúr
Eight centuries since still charms the wise
to-day."

Omar was intensely human; wholly outspoken and a modern of the moderns. It is this which accounts for his vogue. There is a fascination in the ease with which he bridges the centuries, and speaks as one with us to-day. Devout at heart he rails not at religion, but at formalism. The average reader accepts Omar in spite of the natural misconception of him, which was due in part to two things: First, it was the poetic custom of his day to hymn the grape (Oriental poetry is filled with the praises of wine); second, much of the poetry of the Orient must be interpreted mystically.

Now, a considerable proportion of his poetry consists of *Kufriya*, the drinking quatrains, in which he praises wine or questions the authority or opinions of the *Zahids*.

The first of his quatrains known to have been translated into a European language was one of this class translated by

Dr. Thomas Hyde in 1700, into Latin, and Englished is:

"Oh burning, burning, burnt, Oh thou to be
Consumed in fires of hell made bright by thee,
How long 'Have mercy, God, on Omar say?'
For who art thou to teach God clemency?"

Those who view Omar as a sot interpret all his quatrains literally, and have very small regard for the facts which were that he attained a long life and a very high position in his day as a mathematician and astronomer, and as the author of numerous scientific works. Surely the high esteem in which he was generally held, his obvious industry and great accomplishments, negative the idea that Omar was a person of dissipated habits. Truly, as FitzGerald well says, "He bragg'd more than he drank of it." And it may be stated in passing that most of the accounts of him in encyclopedias and so-called "lives" abound in errors and misstatements, all of which have contributed to the popular misconception of him.

Another element in Omar's popularity is his universality, that quality in which each reader sees reflected something of his own ideas.

"Each looks on Jamshyd's world-reflecting
Bowl
And sees there his own body and his soul."

How true this is. There are very few who are familiar with the quatrains but find some making a personal appeal to them. The favorite quatrains will cover a wide range and some will be impressed by certain quatrains which make no appeal to others. The truth is Omar deals with subjects near to every human heart,—the problems of life, death, and destiny. He believes in the simple life.

"And he who is of half a loaf possest,
Himself to shelter hath a little nest
Who slaves for none nor is by any served,
Let him be glad for he hath this world's
best!"

He calls, like *Koheleth*, upon us to seize the present, but unlike the Hebrew, he bids us cheer up, rather than despair. He adores beauty in all its manifestations, whether it be a star or a violet, a rose or a beautiful woman, and dwells with a fascinating melancholy upon the transient nature of all earthly things.

"Within his shop a potter I did greet
And saw the master, foot on wheel, complete
Covers and handles for his pots and jars
From heads of long dead Kings and beggars'
feet!

"Stop!" I cried, 'Potter, let thy hand be stayed!

'How long wilt thou the clay of man degrade?'

'Of what think'st thou, thus setting on thy wheel
Firdun's heart and mighty Khusrau's head?'

"Still o'er his task the potter worked alone,
Trampling the clay, unmoved; in mystic tone
The clod cried out to him 'Be gentle, pray!
For thou, like me, wilt be much trampled on!'

"For once yon vase a hapless lover pined,
In snares of beauty's tresses oft confined;
This handle on its neck was once an arm
That oft around the loved one's neck entwined!'

"And then methought, 'Each mote on earth
ere now
Once formed some sunlit cheek or Venus
brow;
Brush the dust gently from thy loved one's
face,
For that was once love's cheek and ringlet,
too!'"

He bids us seize the here and now, and
constantly hymns the glories of nature,
the joys of companionship, of music, and
the cup. Hear him:

"'Tis dawn, Arise! O source of grace and
drain
The brimming bowl and sound the zittern's
strain!

For those who sleep like thee not long re-
main

And they who've gone will ne'er come back
again!

"For now Spring's joyousness o'er earth pre-
vails,
And each glad heart the fields with yearning
hails,

The boughs with flowers gleam white as
Moses' hand,
And every zephyr Jesus' sigh exhales!

"Lo! where'er blooms a rose or tulip bed,
From some King's blood it takes its hue of
red,

Yea, every violet seems like beauty's mole
Sprung from the dust of some once lovely
maid!

"And Zephyr rends the rose's robe in twain,
Her beauty bulbuls praise in joyous strain,
Sit 'neath this rose tree's shade, for many
a rose

Wind strewn in earth hath turned to earth
again."

Those who have hitherto thought
Omar an atheist, on a more intimate ac-
quaintance will be apt to change their
views.

"Ah Love! were thine all worldly wealth and
power,
Thy garden decked with Pleasure's vine and
flower;

'T were all like dew upon the grass at night
Resting—and vanished in the morning hour!

"O Thou who all men's secret thoughts dost
know,

In case of need who succor dost bestow,
O, Lord give me repentance and forgive,
Thou from whom penitence and pardon flow!

"My body's life and all my strength Thou art!
My heart and soul are Thine, O Soul and
Heart!

Thou art my being and completely mine!
And I'm all Thine, since I'm of Thee a part!

"I'm wearied, Lord, at this low state of mine,
And at my empty-handedness repine;

Since life Thou mak'st from naught, bring
me from naught

Into Thine own existence, made divine!"

Edward Francis Thompson

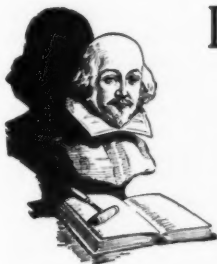


Publication in the Law of Copyright

BY WM. S. TORBERT

Of the District of Columbia Bar

Author of "Digest of Patent, Trade-Mark and Copyright Cases;" "Index-Digest of District of Columbia Cases," etc.



IT is a theory concerning the nature of copyright that an author has, by the common law, the exclusive right to control his works before, but not after, publication. His property right in his intellectual productions before publication is as whole and complete as that which exists in material possessions. The theory that this right is lost by publication is severely condemned by some writers. It has been said by one authority that "to say that authors have rights of property in their literary productions, and that they are lost by publication, which is their only source of value, is absurd. It is destructive of the first principles, the essence, the very notion, of the right of property."¹

But, however sound or absurd may be the theory as to the extent of literary property at common law, and the effect of publication, the exclusive right of an author in this country to multiply copies of his work is of statutory origin;² and, while some authorities have doubted the right of the legislature to limit or abridge the common-law perpetual ownership of literary property, that right has been recognized as embraced in the provision of § 8, article I, of the Federal Consti-

tution, which grants to the Congress power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," as that provision has been construed in the light of British interpretation of the first copyright statute, 8 Anne, chap. 19, passed in the year 1710.

The earliest legislative action in this country looking to the securing of copyright to authors and publishers was a resolution passed by the Colonial Congress on May 2, 1783, on the recommendation of a committee consisting of Messrs. Madison, Izard, and Williamson. This resolution recommended to the several states the securing of the copyright in books "not hitherto printed." The recommendation was acted upon by all of the original thirteen states, with the exception of Delaware. Each recognized and confirmed in an author the exclusive right to print and publish his work for a specified period, varying in duration. Some of them confined the right to books not yet printed, in this respect closely following the recommendation of the Congress, while others included not only works that had not been printed, but also such as had.

The first Federal copyright act was passed by the Congress on May 31, 1790, and limited its benefits to those who performed the acts prescribed before publication. Certain formalities were prescribed and these must be performed before publication. This restriction of nonpublication has been followed in subsequent statutes.

Did Congress by the act of 1790 sanction an existing right or create a new one? This question was answered by the

¹ Drone, Copyright.

² American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722.

Supreme Court in *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055, where it was said that the statute created a new right, and was not a mere sanction of an existing one.³ In this country, therefore, the exclusive right of an author to multiply copies of his work is of statutory origin, and, like other statutory rights, is dependent upon strict compliance with statutory requirements.⁴ Under the laws of this country, before one shall be entitled to a copyright "he shall, before publication, deliver at the office of the Librarian of Congress . . . a printed copy of the title of the book," and, "within ten days from the publication thereof, deliver at the office of the Librarian of Congress . . . two copies of such copyright book," etc.⁵ The author, in order to maintain an action for the infringement of his copyright, must imprint in each copy a notice in prescribed form.⁶ It is the policy of the law that the author must signify by overt acts his intention to retain unto himself the monopoly which the law grants him; and any action on his part negating such intention is considered a dedication of his work to public use. This, of course, precludes his availing himself of the protection which otherwise he might have obtained under the statute.

³ *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; *Calliga v. Inter Ocean Newspaper Co.* 215 U. S. 182, 54 L. ed. 150, 30 Sup. Ct. Rep. 38.

⁴ *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

⁵ Rev. Stat. § 4956, U. S. Comp. Stat. 1901, p. 3407.

⁶ Rev. Stat. § 4962, U. S. Comp. Stat. 1901, p. 3411.

The courts frequently have been called upon to decide what constitutes a publication amounting to the dedication of the work of an author to the public use, and thereby making it common property, and not the subject of copyright. It is the purpose of this article briefly to review

the decisions bearing upon this subject. It may be noted, in passing, that publication in the law of copyrights is analogous to public use in the law of patents, although in the latter case the right to patent is not barred unless the use was anterior to a period of two years from application, while in the former case publication at any time before steps taken to secure the copyright will invalidate it. The mere printing of a book cannot constitute publication,⁷ as one may wish to preserve in tangible form his thoughts or the result of his research for his

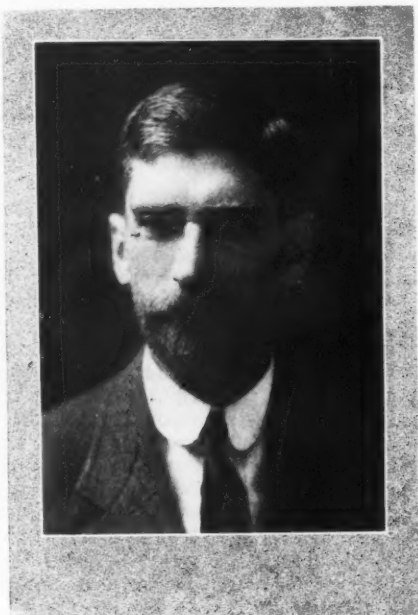
own use or delectation; nor would the reading of a manuscript lecture⁸ or performance of a manuscript play in public by the author confer upon the hearer any title to the manuscript, or any right to a copy thereof which might surreptitiously or accidentally come into his possession.⁹

*Delivery of copies of an ode to be read at dedicatory exercises, to members of a committee, solely to enable them to decide whether the poem was one suitable and worthy of their acceptance, is

⁷ *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* 84 Hun, 12, 32 N. Y. Supp. 41.

⁸ *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082, 5 McLean, 32, Fed. Cas. No. 1,076.

⁹ *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Cas. No. 1,691.



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not a publication of the author's work.¹⁰ The public performance of a drama is not such a publication as will defeat a copyright subsequently obtained for the composition;¹¹ nor is it a publication made prerequisite to the securing of a copyright.¹² In the case of a painting, to constitute publication there must be such a dissemination of the work itself among the public as to justify the belief that it took place with the intention of rendering such work common property;¹³ and so, where a painting was publicly exhibited, subject, however, to reservation of copyright and to restrictions rigidly enforced, against copying, it was held that there was no publication affecting the artist's or owner's rights.¹⁴

These are instances of restricted publication, which demonstrate no intention on the part of the author or artist to abandon his right to the statutory monopoly.

What, then, is a publication which will invalidate a subsequently acquired statutory copyright? As before stated, there must be a dissemination of the work among the public such as to justify the inference of dedication or abandonment to public use. Of course, an unqualified publication by printing and offering copies for sale is such a dedication.¹⁵ Where one sent copies of his work to booksellers and private individuals for examination, and in a single instance accepted money in payment for a copy so distributed, it was held a publication destroying his rights under the statute;¹⁶ and it has been held that the leaving of copies of a musical composition with a music dealer for sale, but with instructions not to sell

any before a specified time, constituted a publication and dedication of such composition to the public, although a copyright was in fact obtained before the date on which the dealer was authorized to sell.¹⁷ The authority of this decision may, however, well be doubted.

The effect of publication of the libretto and vocal score of an opera in London, with the consent of the authors, on a copyright obtained in this country on a piano-forte arrangement of the orchestral score, which piano-forte arrangement was included in the sale of the libretto and vocal score in London, came before the courts in the *Mikado Case*, and it was held that the publication was a dedication by the authors to the public of their entire dramatic property in the opera, notwithstanding their retention of the original orchestral score in manuscript.¹⁸ And in the earlier *Iolanthe Case*,¹⁹ where the libretto and vocal score were by the same authors, who sanctioned their publication in the United States with piano-forte accompaniment, they, as in the *Mikado Case*, having kept the orchestration in manuscript, the court reached the same conclusion.

The serial publication in a magazine prior to any steps taken toward securing a copyright is a publication of the matter which will prevent the issuance of a valid copyright of a book containing the same matter;²⁰ and the fact that the magazine itself has been copyrighted by its publishers acting for themselves does not alter the situation of the author of the particular article.²¹

The exhibition of a manuscript unpublished map in a public office where it could be consulted by the general public was held a publication;²² as was the selling of copies of a book by the author to all persons paying him for a course of instruction connected therewith, during a number of years, and this, although

¹⁰ *Press Pub. Co. v. Monroe*, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196, 51 L.R.A. 353.

¹¹ *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Cas. No. 1,691; *Boucicault v. Wood*, 2 Biss. 34, Fed. Cas. No. 1,693.

¹² *Boucicault v. Hart*, 13 Blatchf. 47, Fed. Cas. No. 1,692.

¹³ *Slater, Copyright*, 92; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595.

¹⁴ *American Tobacco Co. v. Werckmeister*, *supra*.

¹⁵ *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076.

¹⁶ *Gottschberger v. Aldine Book Pub. Co.* 33 Fed. 381.

¹⁷ *Wall v. Gordon*, 12 Abb. Pr. N. S. 349.

¹⁸ *Carte v. Duff*, 23 Blatchf. 347, 25 Fed. 183.

¹⁹ *Carte v. Ford*, 15 Fed. 439.

²⁰ *Holmes v. Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; *Mifflin v. Dutton*, 107 Fed. 708.

²¹ *Mifflin v. R. H. White Co.* 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769.

²² *Rees v. Peltzer*, 75 Ill. 475.

each purchaser was bound by contract not to communicate the contents of the book to any one else.²³

Nor may one give away copies of his work or leave them in a public place where the general public may inspect them, and then obtain a valid copyright. This was the conclusion in a case where the author of a pamphlet, designed to advertise his business, gave away copies thereof and left copies in the public office of a hotel, and thereafter obtained a certificate of copyright, the court holding that there had been a publication rendering the copyright ineffectual.²⁴

²³ Larowe-Loisette v. O'Loughlin, 88 Fed. 896.

²⁴ D'Ole v. Kansas City Star Co. 94 Fed. 840.

As to what constitutes publication no general principle has been adduced by the decided cases, each case depending upon its own peculiar facts and circumstances. Owing to the limited scope of this paper, American cases only have been reviewed, and it would appear from them that courts are reluctant to deprive authors of the fruits of their intellectual efforts, and have only done so, in respect at least of publication, when the facts strongly pointed to an intention to dedicate to public use.



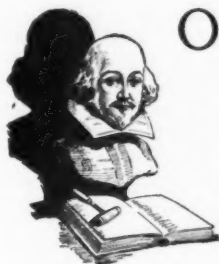
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Oliver Goldsmith's Relation to the Law

By ALVIN WAGGONER

Of the Philip (S. D.) Bar



OLIVER Goldsmith was more intimately associated with lawyers than any other literary man of the eighteenth century. At the very outset of his career an unlucky run of the cards kept him from entering upon a proposed course as a law student. Later, he was domiciled for many years in that great stronghold of English law and lawyers, the Temple. Still later, he died there, and was buried in the Temple garden.

After the examining bishop had rejected young Goldsmith's application for holy orders, and after he had made a dismal failure of teaching school, a family council was held to determine what should be done with the young profligate, who was already beginning to exhibit the tendencies toward vagabondage that so distinctly characterized his later life. Out of the deliberations of this council came the suggestion that Oliver be sent to London to study law in the Temple. Uncle Contarine had the necessary money; and, as the suggestion was pleasing to Goldsmith, he set forth upon his journey. Arriving in Dublin, with £50 of his uncle's money in his pocket, he met a stranger, who met a friend, who proposed a game of cards. The adventure reads like some more modern chronicle. Certainly it ended like one; for Goldsmith lost the £50. Upon his arrival home, weary and ragged, the family council was again assembled. It was decided, according to one of Goldsmith's biographers, that no man would ever succeed at the law, who "let the other fellow do the

fleeing." More than likely this is merely an attempt at humor. Certainly it was not deemed to have serious weight as an argument; for it was decided to send Oliver to Edinburgh to study medicine. All plans for a career at the bar had come to an end.

But Goldsmith was not to part company with the lawyers. Edmund Burke was his college mate at Dublin University, where Goldsmith was domiciled at various irregular intervals, and, afterwards in London, these two were lifelong friends. Both were members of the famous "Literary Club" of which Dr. Samuel Johnson was the presiding genius. At this club Goldsmith encountered his most distinguished critics in the persons of two lawyers,—James Boswell and John Hawkins. What Hawkins wrote was not of far-reaching consequence, but the disparagement heaped upon Goldsmith by Boswell in the "Life of Johnson" long ago became a byword for unjust literary criticism. David Garrick was another member of the "Literary Club." He had given up the law for the stage, and was at the height of his fame, when he was asked by Goldsmith, ten years after their first meeting, to produce "The Good-Natured Man."

Goldsmith received £500 for his play, and spent the money in leasing and furnishing apartments at No. 1 Brick Court, the Temple. He was now in the midst of lawyers, and with them he spent the remainder of his life. For a time he shared his rooms with a lawyer named Cooke. During one summer he had quarters in the country at Ilslington in partnership with still another attorney,—one Boggs. There were lawyers on every hand, and Goldsmith seems to have lived in happy communion with them.

The apartments at No. 1 Brick Court

were the scenes of many gay gatherings. At this time, though Goldsmith had sold his "Vicar of Wakefield" for £60, the poet's fortunes had improved until he was the best paid literary worker in England. But both the money he earned and the money he borrowed were spent freely. Johnson, Burke, Reynolds, Boswell, Garrick, and others assembled on many occasions at Goldsmith's lodgings and held high carnival. These celebrations were always noisy and frequently lasted late into the night to the discomfort and annoyance of neighbors, serious-minded lawyers unused to the gay frolics of the literary world.

On one occasion, at least, this lively crew disturbed the tenant who occupied quarters immediately below those of Goldsmith. This tenant was a sober, industrious lawyer. Moreover, he was engaged in writing a serious book, and the revelers overhead must have broken in sadly upon the contemplations of his great theme. The lawyer's name was William Blackstone; the book, "Commentaries on the Laws of England." Washington Irving has told of the incident in his "Life of Goldsmith:" "He [Goldsmith] gave dinners to Johnson, Percy, Reynolds, Bickerstaff, and other friends of note, and supper parties to young folks of both sexes. These last were preceded by round games of cards, at which there was more laughter than skill, and in which the sport was to cheat each other; or by romping games of forfeits and blindman's buff, at which he enacted the lord of misrule. Blackstone whose chambers were immediately below, and who was studiously occupied on his 'Commentaries,' used to complain of the racket made overhead by his reveling neighbor."

Soon after the publication of "She Stoops to Conquer," Goldsmith played the part of aggressor in one of those escapades commonly known as "whipping the editor," and thereby came in contact with the law. He was indicted for assault and battery and made the defendant in an accompanying civil action for damages. The matter was, however, settled upon the payment by Goldsmith of £50 to a Welsh charity designated by the complainant. Inasmuch as the offended

author had used his cane quite freely, overturning a lamp of oil upon his antagonist during the conflict, it is quite likely that he considered that he had received full value for his money, and so told his lawyer, as is usual in such cases. The incident is not without its humor. It certainly does violence to some of our cherished literary traditions regarding the long-suffering and meek inoffensiveness of poets in general.

But Goldsmith "flung his life away in handsful," and, broken in spirit and overwhelmed with debts, he came to the end of his course April 4, 1774, at his lodgings in the Middle Temple. He had borrowed much money from his lawyer neighbors, and, in turn, had shared his purse with them as their necessities arose. In spite of all his mad-cap frolics, they loved him, and had been proud of the distinguished literary genius who resided in their midst. They were his most sincere mourners, now that he was gone.

Every biographer of Goldsmith has given more or less credence to a strange story of the poet's entanglements with the law at his death. Unquestionably Goldsmith died heavily in debt. Sir Joshua Reynolds estimated the debts at £2,000. According to the story these debts disrupted the funeral arrangements. A public funeral in Westminster Abbey was planned; the pall bearers had been selected from the distinguished circle to which Goldsmith belonged; and then the rapidly maturing plans came to a sudden halt. The public funeral was given up without explanation. The burial took place simply, almost secretly, in the ground of the Temple Church. None of the old literary friends were present. This strange change in procedure has been explained by the statement that friends feared that creditors would interfere with the public funeral by seizing the body, a right which it is alleged the creditors had under the law at that time. This explanation has been reiterated until it is quite generally believed. As a matter of fact the story is without foundation, because the law of England never gave a right of this nature to creditors. The story has also been quite industriously circulated about Richard Brinsley Sheridan, who likewise died heavily in

debt. Whatever it was that changed the plan of a public funeral for Oliver Goldsmith, it may be safely asserted as a legal proposition that there was not any likelihood that the dead body would be seized by creditors. Possibly Forster came near the truth when he said, "It was felt that a private ceremony would better become the circumstances in which he died."

So it came about that Goldsmith was buried by his lawyer friends and neighbors within the boundaries of their own domain. He had lived his happiest days among them, and it was, after all, more fitting that he should lie down to his long rest in their midst, rather than in a garish and splendid tomb in Westminster

Abbey. The exact spot of the grave has long been forgotten; but in 1837 the Benchers of the Temple Inn placed a marble slab in the church of the Temple, and this is pointed out to visitors as the poet's resting place. It is hallowed ground, and the lawyers, who now frequent that spot, may well turn aside from the plodding course of their daily routine, and pay homage to the poet who lived among their brethren of another age and loved them with all the fervor of his simple, honest heart.

Alvin Waggoner.

The Secondhand Book

Dear secondhand discarded book,
'Tis pleasure on thy face to look,
And note the clear well written name
Of him whose joy thou first became,
And then, in fancies' realm, to trace
The features of a beaming face
Of one who first thy merits saw
To aid him in the courts of law.

What pleasure 'twas for one to buy
Who saw thee with a student's eye!
What hopes and visions of success
Gave promptings to his eagerness!
With thee, his ever-certain aid,
He'd counsel clients unafraid,
And quoting thee would win his suit,
With fame and ample fees to boot.

Was it thy mission to behold
Thy owner's dreams to turn to gold,
And when his work in life had passed
To see him also shelved at last?
Or was thy owner fair and young
With fame and fortune still unsung,
Who yet may fair successes see,
Though he has said farewell to thee?

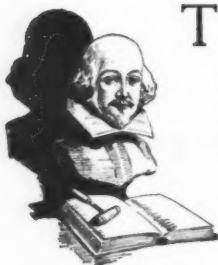
Whate'er thy history hath been
Amid the cares and strifes of men,—
Whatever yet thy lot may be,
One lesson we may learn from thee.
Each in his turn may fill his place
With merit, usefulness, and grace,—
Each, when his usefulness is past,
May find a friendly shelf at last.

Wm D. Fetter

Scott and the Lawyer

By KENNETH G. SILLIMAN

Of the Sioux City (Iowa) Bar



THAT human nature does not change, and that lawyers and clients hold substantially the same feelings towards each other down through history, is shown in "Guy Mannering," written by Sir Walter Scott in the year 1829. This story depicts life in Scotland early in the eighteen hundreds. Colonel Mannering and his *protégée*, Miss Bertram, had received word of the death of Miss Bertram's spinster aunt, and also that this aunt had executed a settlement in favor of Miss Bertram some ten years prior to her decease. Colonel Mannering consulted his local lawyer, in whom he had great confidence, and asked this barrister to go with him to the distant city where the aunt had lived. The lawyer, being about to try a jury case, was forced to refuse, but gave the colonel a letter to a lawyer in the city. The lawyer's name was Pleydell, and he was well recommended.

Colonel Mannering arrived in the city on a Saturday night, and at last located Mr. Pleydell in a tavern with a number of friends, playing the long forgotten pastime of "High Jinks." The game was played with dice, and those upon whom the lot fell were obliged to assume and maintain for a time a fictitious character. If they departed from the character assigned, they incurred a forfeit, which was either compounded for by swallowing an additional bumper or by paying a small sum towards the reckoning. Mr. Counselor Pleydell was enthroned as a monarch, and the colonel readily entered into the jest, explaining his mission to the counsel much as a subject would to

his King. It is during the conversation between them that the following interruption takes place, which I give you in the words of Scott:

"Dinmont, who had pushed Mannering into the room, began to scrape with his foot and scratch his head in unison, 'I am Dandie Dinmont, sir, of Charlieshope—the Liddesdale lad—ye'll mind me?—it was for me ye won yon grand plea.'

"'What plea, you logger head?' said the lawyer, 'd'ye think I can remember all the fools that come to plague me?'

"'Lard, sir, it was the grand plea about the grazing o' the Langtae Head!' said the farmer.

"'Well, curse thee, never mind; give me the memorial (brief) and come to me on Monday at ten,' replied the learned counsel.

"'But, sir, I haena got ony distince memorial.'

"'No memorial, man?' said Pleydell.

"'Na, sir, nae memorial,' answered Dandie; 'for your Honour said before, Mr. Pleydell, ye'll mind, that ye liked best to hear us hill folk tell our ain tale by word o' mouth.'

"'Beshrew my tongue, that said so!' answered the counselor, 'it will cost my ears a dinning. Well, say in two words what you've got to say—you see the gentleman waits.'

"'Ou, sir, if the gentleman likes he may play his ain spring first; it's a' ane to Dandie.'

"'Now, you looby,' said the lawyer, 'cannot you conceive that your business can be nothing to Colonel Mannering, but that he may not choose to have these great ears of thine regaled with his matters?'

"'Aweel, sir, just as you and he like—so ye see to my business,' said Dandie, not a whit disconcerted by the roughness of his reception. 'We're at the auld

wark o' the marches again, Jock o' Dawson Cleugh and me. Ye see we march on the tap o' Touthop Rigg after we pass the Pomoragrains; for the Pomoragrains, and Slackenspool, and Bloodylaws, they come in there, and they belang to the Peel; but after ye pass Pomoragrains at a muckle great saucerheaded, cut-leg-

"And what difference does it make, friend?" said Pleydell. "How many sheep will it feed?"

"Ou, no mony," said Dandie, scratching his head,—"it's lying high and exposed—it may feed a hog or aiblins twa in a good year."

"And for this grazing which may be



Photo by Horace K. Turner Co., Newton Center, Boston, Mass.

SIR WALTER SCOTT.—Leslie.

ged stane, that they ca' Charlies Chuckie, there Dawson Cleugh and Charlies-hope they march. Now, I say, the march rins on the tap o' the hill where the wind and water shears; but Jock o' Dawson Cleugh again, he contravenes that, and says, that it hauds down by the auld drove road that gaes awa by the Knott o' the Gate ower to Keeldar-ward—and that makes an unco difference.'

worth five shillings a year, you are willing to throw away a hundred pound or two?'

"Na, sir, it's no for the value o' the grass," replied Dinmont; 'it's for justice.'

"My good friend," said Pleydell, 'justice, like charity, should begin at home. Do you justice to your wife and family, and think no more about the matter.'

"Dinmont still lingered twisting his

hat in his hand—"It's no for that, sir—but I would like ill to be bragged wi' him—he threeps he'll bring a score of witnesses and mair—and I'm sure there's as mony will swear for me as for him, folk that lived a' their days upon Charles-hope, and wadna like to see the land lose its right."

"'Zounds, man, if it be a point of honour,' said the lawyer, 'Why don't your landlords take it up?'"

"'I dinna ken, sir (scratching his head again), there's been nae election dursts lately, and the lairds are unco neighborly, and Jock and me cana get them to youke thegither about it a' that we can say—but if ye thought we might keep up the rent—'"

"'No! no! that will never do,' said Pleydell,—'confound you, why don't you take good cudgels and settle it?'"

"'Odd, sir,' answered the farmer, 'we tried that three times already—that's twice on the land and ance at Lockerby Fair. But I dinna ken—we're baith gey good at singlestick, and it couldna weel be judged.'"

"'Then take broad swords, and be d—d to you, as your fathers did before you,' said the counsel learned in the law."

"'Aweel, sir, if ye think it wadna be again the law, it's a' ane to Dandie.'"

"'Hold! hold!' exclaimed Pleydell, 'we shall have another Lord Soulis' mistake—Pr'ythee, man, comprehend me; I wish you to consider how very trifling and foolish a lawsuit you wish to engage in.'"

"'Ay, sir?' said Dandie, in a disappointed tone. 'So ye winna take on we' me, I'm doubting?'"

"'Me! not I—go home, go home, take a pint and agree.' Dandie looked but half contented, and still remained stationary. 'Anything more, my friend?'"

"'Your Majesty,' said Mannering laughing, 'has solemnized your abdication by an act of mercy and charity—that fellow will scarce think of going to law.'"

"'Oh, you are quite wrong,' said the experienced lawyer, 'He'll never rest till he finds somebody to encourage him to commit the folly he has predetermined—No! No! I have only shown you another

weakness of my character—I always speak the truth of a Saturday night.'"

I here skip over some events and come to the next meeting of Dandie and Mr. Pleydell. In the meantime Dandie has gone to another lawyer and made arrangements with him to handle his case. On finding this out, and perhaps being in a different mood, Mr. Pleydell agrees to take the case. To this acceptance Dandie replies, "'God, we'll ding Jock o' Dawston Cleugh now after a,'" and he slapped his thigh in great exultation.

"'Shall you be able to carry this honest fellow's cause for him?'" asked Colonel Mannering of Pleydell.

"'Why, I don't know; the battle is not to the strong, but he shall come off triumphant over Jock of Dawston if we can make it out. I owe him something. It is the pest of our profession, that we seldom see the best side of human nature. People come to us with every selfish feeling newly pointed and grinded; they turn down the very caulcers of their animosities and prejudices, as smiths do with horses' shoes in white frost. Many a man has come to my garret yonder, that I have first longed to pitch out at the window, and yet, at length, I have discovered that he was only doing as I might have done in his case, being very angry, and, of course, very unreasonable. I have not satisfied myself, that if our profession sees more of human folly and human roguery than others, it is because we witness them acting in that channel in which they can most freely vent themselves. In civilized society, law is the chimney through which all the smoke discharges itself that used to circulate through the whole house, and put everyone's eyes out—no wonder, therefore, that the vent itself should sometimes get a little sooty. But we will take care our Liddesdale man's cause is well conducted and well argued, so all unnecessary expense will be saved—he shall have his pineapple at wholesale price.'"

Kenneth G. Lilliman



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POETS' CORNER, WESTMINSTER ABBEY.

Legal Experiences of Great Authors

BY JOHN D. CHAMBERLAIN

Of the Rochester (N. Y.) Bar



I T would seem that no flowery path leads to the poets' corner in Westminster Abbey. Many of our greatest writers felt the pangs of hunger and were persecuted unmercifully. The first great figure of modern English literature, Geoffrey Chaucer, was hounded from pillar to post by his creditors. So persistent were they

that the King of England in response to a petition took Chaucer under his special protection and forbade him for two whole years to be arrested or sued by anybody except on a plea connected with land.

Though calmness and self-possession may be affirmed of John Milton, so far as his poems and poetic character are concerned, the mind pictures the man as being poor, sick, old, blind, slandered and persecuted.

In 1660, fourteen years before his death, it was ordered by the House of Commons that his "Defensio" and John Goodwin's "Obstructors of Justice"

should be burnt by the common hangman, and that Milton and Goodwin should be indicted by the attorney-general and taken into custody by the sergeant-at-arms. A proclamation was issued ordering the surrender of all copies of the books named. It stated that both the authors had concealed themselves. Milton was arrested in the course of the summer, but in the next session it was ordered that he should be released on paying fees. He protested against the excessive amount of the fees (£150) and his complaint was referred to the committee on privileges. Finally the indemnity act freed him from all the legal consequences of his actions.

Samuel Johnson, an English divine, who wrote much and suffered severely in support of the Revolution of 1688, was condemned to pay a fine of five hundred marks, on account of his book "Julian the Apostate," and was thrown into the King's bench until he should pay it. After being confined there for some time he obtained his release. In 1686, he published "An Humble and Hearty Address to All the Protestants in the Present Army." For this he was condemned to stand in the pillory in Palace Yard Charing Cross and the Old English Exchange, to pay a second fine of five hundred marks, to be degraded from the priesthood, and to be publicly whipped from Newgate to Tyburn. When the Revolution finally came the House of Commons made him full amends, declaring the whole proceedings taken against him to have been illegal, and, in an address to the King, recommended him to some ecclesiastical preferment suitable to his services and sufferings.

The imperishable allegory on which Bunyan's claim to immortality chiefly rests, the "Pilgrims Progress," was at least planned in jail, and probably the first part was written there. His "Grace Abounding," "Holy City," "Resurrection of the Dead," together with other treatises and tracts, were also composed in the "Den" where he languished twelve years. He obtained his full release through the intervention of the Quakers, and his name is included in the "general pardon" passed by the King in council in behalf of the prisoners of that persuasion, bear-

ing date September 13, 1672. Bunyan will perhaps always hold rank as one of the first among religious writers in the English language.

Accused on the strength of a forged document, and even while he was ambassador to Boniface VIII., of extorting money, the poet Dante was sentenced to make pecuniary reparation and to two years banishment. His house was given up to pillage, and his lands devastated. Three months afterwards, he having neither paid the fine, nor sought to justify himself, his enemies condemned him to be burnt to death. Then began for Dante the "Hell of exile."

Everybody has heard of Shakespeare's poaching adventures—how as a consequence of his stealing deer in Sir Thomas Lucy's Park he was obliged to leave his business and shelter himself in London.

According to the testimony of Archdeacon Davies, who was vicar of Saper-ton, Gloucestershire, late in the seventeenth century, Shakespeare "was much given to all unluckiness in stealing venison and rabbits, particularly from Sir Thomas Lucy, who, had him oft whipt, and sometimes imprisoned, and at last made him fly his native country to his great advantage."

As Pope said of him:

"For gain, not glory, winged his roving flight
And grew immortal in his own despite."

Shakespeare inherited his father's love of litigation, and stood rigorously by his rights. In March, 1600, he recovered in London a debt of 7*l* from one John Clayton. In July, 1604, in the local court at Stratford he sued one Philip Rogers, to whom he had supplied since the preceding March, malt to the value of 1*l* 19*s*. 10*d*. and had on June 25 lent 2*s*. in cash.

Rogers paid back 6*s*. and Shakespeare sought the balance of the account, 1*l* 15*s*. 10*d*.

During 1608 and 1609 he was at law with another fellow townsman, John Addenbroke. On Feb. 15, 1609, Shakespeare, who was apparently represented by Thomas Greene, obtained judgment from a jury against Addenbroke for the payment of 6*l* and 1*l* 5*s*. costs, and Shakespeare proceeded against one Thomas Hornley, who had acted as the absconding debtor's bail.

The author of the "Deserted Village," Oliver Goldsmith, in May, 1747, was admonished for abetting a riot in which some bailiffs were ducked in the college cistern, the four ringleaders being expelled. Some years later Goldsmith was driven into New Castle, where he went ashore with some companions, and the whole party was arrested on suspicion of having been enlisting for the French service in Scotland. Goldsmith was in prison for two weeks, during which time the ship sailed and was lost with all the crew.

Boswell tells the story that Johnson was one morning called in by Goldsmith, whose landlady had arrested him for non-payment of rent. Johnson found that Goldsmith had a novel ready for press, which he took to a publisher, sold it for 60*£* and thus enabled Goldsmith to pay up.

The eminent American poet and man of letters, William Cullen Bryant, author of "Thanatopsis" the unrivaled production of a youth of only eighteen, practised law for ten years. He finally quitted the profession, and went to reside in the city of New York, where he exclusively devoted himself to literary pursuits.

Washington Irving, whose *Sketch Book*, *Tales of a Traveler* and *History of New York* have carried millions of readers smoothly and delightfully along the path of fiction, also was a lawyer. He never practised, however. He said that he had been nearly ruined by having a law suit decided against him and completely ruined by having one decided in his favor.

The prince of humorists, Mark Twain, at the age of sixty sacrificed all he possessed to meet the demands of his creditors. In 1884 the firm of which he was president and which was organized to publish his works made an assignment for the benefit of its creditors. Twain could have taken refuge in his wife's fortune, upon which the law had no claim. She, however, shared his misfortune and stood with him penniless. His reply to an insinuation that he was about to take an unfair advantage of his creditors was: "The law recognizes no mortgage on a man's brain, and a merchant who has

given up all he has may take advantage of the law of insolvency and start free again for himself; but I am not a business man, and honor is a harder master than the law. It cannot compromise for less than a hundred cents on the dollar."

The great parallel case to Twain's was that of Sir Walter Scott, who lost his all through the failure of his printers, the Ballantynes. In two years, however, he earned for his creditors nearly £40,000.

The poet, Percy Bysshe Shelley, one of England's greatest glories, author of "Alastor" and "Queen Mab," was pronounced by the court "unfit" to take care of his own children. The legal proposition involved was that a father has *prima facie* a right to the custody of his children; but the court has power to deprive him of that right if it considers him by reason of immoral principles and conduct, unfit to have their custody.¹

Much litigation has arisen over the right to publish and sell literary productions.

Thus the earliest English reported case, *Pope v. Curl*, 2 Atk. 342, was decided in 1741, concerning an English reprint of letters of Swift, Pope, and others from a pirated Irish edition. The Lord Chancellor, on motion to dissolve the injunction after issue joined, said the letters were without the intention of the statute of Anne the same as any other book, and were not a gift to the receiver, but only passed a special property and no license to publish without the writer's consent.

In 1774, the widow of Lord Chesterfield's natural son was restrained at the instance of the writer's executors from publishing the celebrated "Letters" although she showed that he had declined to take them back on her offer to return them. It was considered that this fell short of consent to publish, and that the letters might be regarded as a system of education, hence a literary production.²

This case was followed in 1809, by *Granard v. Dunkin*, 1 Ball. & B. 207, when publication of private letters was restrained. In that case defendant had married a relative of the plaintiff's testator, and been permitted to occupy her

¹ Shelley v. Westbrook, Jacob, 266, n.

² Thompson v. Stanhope, 2 Amb. 737.

Dublin house, in which she left, on going into the country, many books, papers and letters from divers correspondents, including the plaintiff. She died while away and her will named plaintiff executrix and residuary legatee. Defendant having refused to give up the books, papers, and letters, and threatened to publish the latter the suit was brought. It was contended that letters being properly vested as assets in the executrix, she was alone entitled to profit from the publication, and that the case of *Chesterfield's* letters was not so strong as the one at bar, because here defendant had no shadow of title.

In a notable case of recent times between Lord Lytton and the executors of his mother to prevent the publication of Bulwer's letters, an injunction was granted notwithstanding a plea that publication was necessary to vindicate the memory of Lady Lytton, as the court held that no such publication could be subserved by such publication.³

In 1752, an injunction issued against the publication of an unauthorized edition of "Paradise Lost" including Fenton's "Life of Milton" and notes of all former editions, but it also included notes by Dr. Newton, which were plainly protected by the statute of Anne.⁴

In 1760 a case over the right to publish, "The Spectator" arose. The plaintiff claimed in the right of Addison and Steele. His contention was that, independent of the statute, there was an exclusive right in an author and his assigns in his works in perpetuity, and that the statute of 8 Anne was passed merely as additional sanction by imposing penalties for infringing that right. Yates, afterwards the dissentient in *Millar v. Taylor*, 4 Burr. 2303, is said to have been counsel in that case, and to have maintained the contrary. The court inclined toward the view that the plaintiff had a perpetual right by the common law, but discovered that the action was a collusive one between the parties, and dismissed it upon that ground.⁵

In 1769, the King's bench was called

upon to decide a controversy over a right to publish Thomson's "Seasons," and according to the headnote the case is the first determination in that court of the old and oft litigated right of literary property. This is the celebrated case of *Millar v. Taylor*, 4 Burr. 2303, the foundation of the whole claim to literary property in perpetuity after publication.

The case was twice elaborately argued by the then leaders of the English bar, the first time by Dunning for the plaintiff and Thurlow for the defendant, and the second time by Blackstone for the plaintiff and Murphy for the defendant, before a court composed of Lords Mansfield and Willes, Aston, and Yates, JJ. It was contended in plaintiff's behalf that a property remained in authors after publication, and that they and their assigns have the sole right to multiply copies at pleasure for sale; and in defendant's behalf, that there was no property right after publication, no author's right at common law at all. The only rights there were, were those given by the statute, and as the time limited by that had expired, these were gone in the case at bar. It was insisted that whatever rights existed in publications anterior to the statute of Anne were printers' rights, not authors', and that all the royal grants were to printers only; that publication was a dedication to the public, and a purchaser of a published book was at liberty to make any use he pleased of it; that the sole right of multiplying copies was a monopoly, and all monopolies were contrary to the common law. The work in question was first published in 1727 and bought by the plaintiff two years later. The plaintiff, a member of the stationer's company, had registered as required by its by-laws to secure the exclusive right to print, and the period of protection given by the statute of Anne had fully expired when the alleged piracy was committed. The author, too, who was a native British subject, had printed for himself only, and assigned to the plaintiff direct, so there was no question of noncompliance with any technical requirement, none of foreign books or abandonment to the public, and as there was a verdict found that plaintiff had printed enough copies to

³ *Lytton v. Devey*, 54 L. J. Ch. N. S. 293, 52 L. T. N. S. 121.

⁴ *Tonson v. Walker*, 3 Swanst. 672.

⁵ *Tonson v. Collins*, 1 W. Bl. 301.

supply the demand, and had them for sale at a reasonable price, there were none of the obnoxious features of monopoly. In short the questions presented for decision were clean cut: (1) Whether the copy of a book or composition belongs to the author by the common law; (2) whether the statute of 8 Anne had taken that common-law right away. The decision was a sweeping triumph for the author's right by a majority of three to one, Mansfield, Willes, and Aston against Yates.

In 1774 the House of Lords distinctly overruled the doctrine of *Millar v. Taylor*, 4 Burr. 2303, supra, and declared the law to be, that property rights in literary productions after they are once published do not exist at common law since the enactment of copyright statutes, but depend upon such statutes alone. Thomson's "Seasons" was again the publication involved.

In 1861, Charles Reade, the novelist, complained of an infringement of his copyright in the novel "Never too Late to Mend," in that it had been dramatized and represented on the stage, and in his behalf it was contended on demurrer on the second account in his declaration that an author had a common-law right in his novel as regards its public representation in dramatic form, which was not impaired by the publication of the copyrighted book, but the demurrer was sustained, the court ruling that the statute (3 & 4 Wm. IV. chap. 15, protecting plays, and 5 & 6 Vict. chap. 45, protecting books) did not apply to a play made from a copyrighted book.⁶

⁶ Reade v. Conquest, 9 C. B. N. S. 755, 30 L. J. C. P. N. S. 269, 7 Jur. N. S. 265, 3 L. T. N. S. 888, 9 Week. Rep. 434.

⁷ Reade v. Conquest, 11 C. B. N. S. 478, 5 L. T. N. S. 677.

⁸ Clemens v. Belford (1883) 11 Biss. 459, 14 Fed. Rep. 728.

⁹ Holmes v. Hurst (1899) 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606.

¹⁰ Murray v. Elliston, 5 Barn. & Ald. 657, 1 Dowl. & R. 299.

¹¹ Reade v. Lacy (1861) 1 Johns. & H. 524, 30 L. J. Ch. N. S. 655, 7 Jur. N. S. 463, 4 L. T. N. S. 354, 9 Week. Rep. 531.

¹² Cooper v. Gunn (1844) 4 B. Mon. 596, Marshall, J.

When later the same case came up after a trial on the merits, a recovery of the plaintiff on a verdict subject to the opinion of the court was sustained because it then appeared that the dramatist of the novel "Never too Late to Mend" had, though unwittingly, infringed the plaintiff's copyrighted play of "Gold," upon which the novel was founded.⁷

If literary works are published without protection by copyright they become public property and may be republished by anyone who chooses to do so.⁸

The right of an author to copyright in his book as an entirety is lost by publishing it first in serial form in a magazine.⁹

In 1882, it was held that an alteration and abridgment of Byron's "Marino Faliero" for representation on the stage for profit, the poem having been previously printed and placed on sale, could not be prevented. But this was because the statute of Anne did not afford protection in such a case. The subsequent English statute 3 & 4 Wm. IV. chap. 15, was intended to remedy this.¹⁰

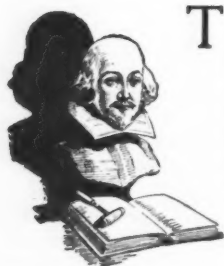
Charles Reade at first wrote a play called "Gold" and afterwards a novel "Never too Late to Mend" with the same plot and many of the scenes and much of the dialogue from the drama; and a dramatization of the novel by a playwright who had never seen the play or a copy of it was held an infringement of the play because it contained passages common to it and the novel.¹¹

It is stated by one jurist that the creditors of an author cannot compel him to write, or to publish a book he has copyrighted, or to give up his manuscript; possibly they cannot, against his will, seize the books themselves, the conclusive right of vending which is vested in him by act of Congress, but when by voluntary sale he has converted this privileged property into property of a different sort, the latter is not exempt.¹²

John Chamberlain

Expert Examination of Ink Marks on Paper

By DR. MARSHALL D. EWELL,
of Chicago, Illinois.



THE chemical treatment of ink on paper, under the rule usually applied by courts, that no application of chemicals may be made which will deface or injure the document in question, at times presents

great difficulty. As a rule the necessary reagents can be successfully applied to some unimportant part of the writing, the reaction observed, and the chemical quickly neutralized, so that not only will no damage be done to the document, but it will require close inspection to determine where the application was made.

In several cases we have been required to determine or restore an underlying writing which has been apparently erased by writing another word or figure over it, by drawing numerous ink marks across it, or otherwise covering it with ink sometimes of a different kind from the underlying one. The desired result can sometimes be accomplished by dissolving off the ink last applied and thus leaving the underlying writing apparent. Often, however, even when the greatest care is observed, both writings will be simultaneously removed, in which case if the underlying writing cannot be restored, as is sometimes possible, the object sought is defeated.

The identification of ordinary writing ink on paper usually presents no great difficulty, and the necessary tests can be made, as above stated, without impairing the instrument in the least degree.

When, however, the paper itself contains a constituent that gives the same

color reactions as those of some of the common inks, the difficulty is greatly increased. In our experience it is not uncommon to find copper or iron in the substance of the paper upon which legal or other documents are written, in amounts sufficient to react to the chemical reagents usually applied.

In such cases a different reagent must be used, or some manipulation resorted to, in order to recognize the reaction of the ink as distinguished from that of the paper, which can usually be done.

Sometime since we were called upon to determine the kind of ink with which writing had been executed upon a bright scarlet paper. The application of a minute drop of the reagent usually applied to ink on white paper disclosed the fact that it stained the paper a dense black, thus obscuring the reaction. It was not permitted to scrape the ink from the paper and thus separate it therefrom, if indeed that were possible on a paper so slightly polished and so porous as the one in question.

We finally succeeded after several trials, by the application of a minute drop of the reagent to thick portions of the ink lines, in identifying the ink as a nut-gall iron ink.

The identification of ink on blue paper, especially where the surplus ink has been removed by a blotter, sometimes presents a similar difficulty, though not so great as in the case first mentioned.

Every case presents its own special facts, and these instances are cited to show the inherent difficulties of such problems. To go at length into the technique of this subject would not be practicable within the limits of this article. The *modus operandi* in every case must depend upon its own particular facts.

Of course, it is the duty of the court to preserve from injury or destruction the document in question before it. In one or two instances we have seen important documents, a contested will in one case, practically destroyed by the careless use of corrosive chemicals by

one claiming to be an expert. There need, as a rule, be no damage to the documents by any proper application of a reagent. In one important case, however (the McCaffrey Case, Cook County, Ill.) the court, with the consent of counsel permitted portions of the document containing written words as well as printed, to be cut out and so treated as to destroy their identity. This, of course, could not have been done without the consent of counsel. The case referred to was a *nisi prius* case, and is not reported. As a necessary precaution

before anyone claiming to be an expert in this department of learning is allowed to make any application of a chemical reagent to a document in a litigated case, his practical as distinguished from merely theoretical qualifications should be carefully inquired into by a proper direct and cross-examination. The ease with which uninstructed counsel are imposed upon by self-alleged experts is astounding. In my experience the most learned and best qualified lawyers are the ones who are most open to suggestions as to the proper presentation of expert testimony and the cross-examination of experts, and the well-qualified expert should be able to instruct counsel when necessary in the performance of these duties; for in the practice of most lawyers handwriting and

ink cases are quite uncommon. Many of the evils attending the use of expert testimony would be remedied if courts and counsel were more careful in their examination into the qualifications of those claiming to possess expert knowledge. No person should be tendered to the court

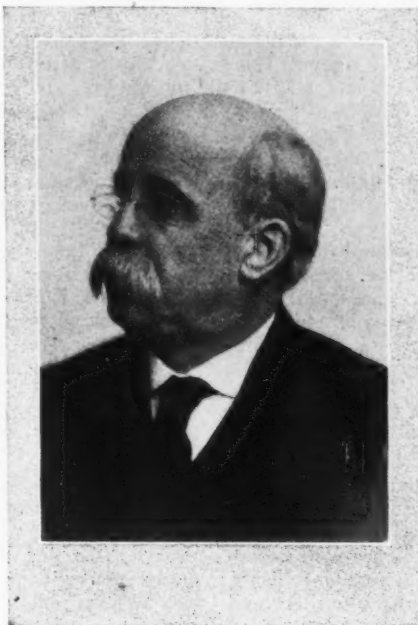
and jury by counsel as an expert witness until the counsel employing him are fully satisfied as to his qualifications. Were the qualifications of a person claiming to be an expert more carefully inquired into by counsel before offering him as a witness, such a case as *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227, would be impossible. This case, though not relating to handwriting or ink, is instructive: A man named Witt was offered as an expert, and testified that a disease of sheep called the "scab" was caused

by an insect, and

that he had often seen it through the telescope, which statement he corrected by stating he had often looked at it through the telephone.

No one claiming to be an expert should, as is often done, be asked on his preliminary examination if he is an expert. This is a question for the court upon the facts presented, not one of opinion for the witness, and opposing counsel should have an opportunity to cross-examine and to offer evidence as to the qualifications of the witness before he is permitted to testify. See *Lawson, Expert Testimony*, 2d ed. p. 277.

We have heard witnesses testify as experts as to the age of ink on paper who could not tell the different kinds of ink in common use, nor make the simplest



MARSHALL D. EWELL

test by which to identify any ink; and too often opposing counsel do not possess nor attempt to acquire the knowledge necessary to expose such ignorance.

Too often, also, courts, especially those presided over by old men in country districts where these questions seldom arise, interpose unreasonable and sometimes unsurmountable obstacles in the way of such tests, not infrequently to the defeat of justice. There is such a thing as being too conservative in this respect. Tests of this sort made by competent persons are often the means of defeating fraud and establishing justice, and should be encouraged rather than discouraged.

One of the most frequent questions propounded to an expert is as to the age of a specimen of handwriting. Sometimes this question can be satisfactorily answered within a reasonable time limit, especially in the case of nut-gall iron inks; but more frequently it is incapable of even an approximate solution. The questions may be complicated by an attempt fraudulently to age the writing artificially; but this can usually be detected by the lack of harmony between the different elements of the case. Long experience is the only safe guide in such cases. To look at the writing in question through a microscope and claim thereby to determine the kind and the age of the ink without a chemical test and without comparison with authentic specimens (as I have not infrequently seen done) is mere charlatanry.

The determination of the sequence of crossed ink lines is another question often propounded to the expert, the solution of which is often full of fallacies. The longer the experience, the more conservative should the expert become in this and the preceding case; for in too many cases the real sequence cannot be determined.

The choice of an ink for legal and general commercial use is a matter of great importance and one that often receives little consideration. We were called some years since as an expert witness in a case to which a national bank was a party, in which the books of the bank

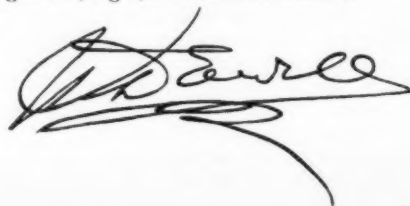
were written with a so-called "anti-rust black ink" which indeed had some merit in not rusting the pens, but which could be wiped off the written page with a damp cloth or sponge.

There is no ink (except carbon inks which are very inconvenient in use) which cannot be removed by appropriate chemical treatment; but there are inks which are convenient in use, give a good black color after the lapse of a short time, and are practically indestructible by lapse of time or any agency likely to be used which will not leave evidence of the fraud upon the paper. The basis of these inks is iron; and they are known as nut-gall iron inks. I have examples of writing executed with this kind of ink which are several hundred years old and are still in excellent condition.

After the lapse of a short time, this sort of ink forms a chemical union with the constituents of the paper, and though capable of being removed by chemicals, enough of the iron will usually be left in the paper to enable the writing to be restored to legibility by appropriate treatment.

All the so-called blue-black writing fluids on the market are nut-gall iron inks, with some coal-tar dye to give a provisional color to the ink when first applied to the paper, and in a short time become permanently black, changing, however, after the lapse of many years to a more or less yellowish black, due to the oxidation of the iron. No other sort of ink should be used for legal or general commercial purposes, as such other inks will, as a rule, either fade with the lapse of time or may be removed from the paper as above described.

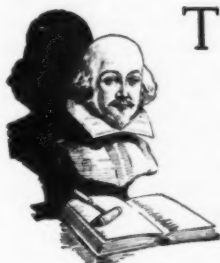
Writing fluids manufactured by Carter, Sanford and other reputable makers, fulfil all the necessary conditions of permanence and are entirely suitable for general, legal, and commercial use.



The Romance of Wills

BY E. VINE HALL

Of London, England.



THE Editor of CASE AND COMMENT having asked me to write a paper under this title, which I adopted for a book published two years ago,¹ I have been considering what exactly is conveyed to

the mind by the romance of wills, and how far the term is legitimately used. Romance, in the earlier sense, imports doubtless an element adventurous or strange, and in the history of wills these elements constantly occur. But the romance of wills, to my mind, consists primarily in the revelation therein of the humour and pathos of ordinary lives. Thus it is that, when here in London, at Somerset House, I turn over the multitudinous leaves of old volumes covering centuries of dispositions conceived by common men and women of other days, in the hour or in the view of death, I feel that I am engaged on a truly romantic quest.

It is a quest, naturally, which has fascinated some on the other side of the Atlantic, too. By a curious coincidence, to which its own romance attaches, Mr. Virgil M. Harris was working on his book "Ancient, Curious, and Famous Wills"² at the same time that I was working on mine, though neither knew of the other's existence then. It is due to his courtesy, and our friendship, that I have the pleasure to contribute to CASE AND COMMENT to-day.

I have mentioned Somerset House,

¹ "The Romance of Wills and Testaments." T. Fisher Unwin, 1 Adelphi Terrace, London, England. \$1.30.

² Published in America by Little, Brown & Co., and in England by Stanley Paul & Co. See also CASE AND COMMENT for December, 1913, p. 481.

where the greatest single store of wills is accumulated in this country. Here are to be found the wills of nearly all the London courts, *e. g.*, the Archdeaconry of London, Commissary of London, Consistory of London, and Archdeaconry of Middlesex, in addition to the chief court of all,—the Prerogative Court of Canterbury. The earliest will a copy of which exists in Somerset House belongs to the Commissary Court of London, and is dated 1374. As to original wills, "the statement usually made, to the effect that the Prerogative Court of Canterbury 'original' wills date as far back as 1484, is somewhat misleading; for in the first place a full half of the earlier filed wills are merely transcripts; and, secondly, with the exception of a single will bearing the date just quoted, there are none of date prior to 1496."³

The copy wills are written on vellum or parchment, strongly bound in big volumes locked with bronze clasps. The originals are, of course, in various conditions and forms. I handled recently a romantic original here, the last diary of Horatio Nelson, written in a little notebook interleaved with thin blotting paper. It contains Nelson's last prayer, followed by a document which was proved as a codicil to his will, and begins: "October 21, 1805. Then in sight of the combined fleets of France and Spain, distant about ten miles." The conclusion, which recalls in some ways Captain Scott's last message from the Antarctic snows, is, it will be remembered, as follows:

"I leave Emma Lady Hamilton therefore a legacy to my King and country, that they will give her an ample provision to maintain her rank in life. I

³ "Index of Wills Proved in the P. C. C. 1383-1558, and now preserved in the Principal Probate Registry, Somerset House, London." Compiled by J. Challenor C. Smith, Superintendent of the Literary Department, Probate Registry, Somerset House (1893).

also leave to the beneficence of my country my adopted daughter, Horatia Nelson Thomson, and I desire she will use in future the name of Nelson only. These are the only favors I ask of my King and country, at this moment when I am going to fight their battle. May God bless my King and country, and all those I hold dear! My relations it is needless to mention; they will of course be amply provided for."

Wills made in distant spots of earth or sea find here a home within the testator's native land. There are some of special interest as links between the Old World and the New. Thomas Cooper made his will, proved in London the 28th August, 1804, on board ship, apparently in the Atlantic Ocean, the 14th October, 1803. "In the name of God Amen. I, Thomas Cooper, chief clerk to Charles Henry Lane, Esq., a Commissioner of His Majesty's Navy, appointed to reside in His Majesty's dockyard at the Island of Antigua in the West Indies, at present on my passage thither on board His Majesty's ship the *Camel*, fully aware of the uncertainty of human existence more particularly so in the West Indies, where the climate is represented as very unhealthy, I feel it my duty to distribute such little property as in the event of my being called by the Supreme Being from this world I may leave behind me."

Henry Honser, whose will was made in Jamaica, February 24, 1682-3, gives "to old father Stubbs here in town" the sum of £5, and "to my goddaughter, Dorothy Zeller, £50 in money, a negro girl to be bought out of the first ship that shall arrive after my decease, four breeding mares, as likewise my chiefest bed and bedstead with chairs and table suitable to it and the great looking glass and standing press to hang her clothes in."

Slaves are frequently mentioned in wills. I have noticed a striking instance in the 1st volume of the New York Historical Society's Abstracts of Wills (p. 225), where Sara Roeloffse, "daughter of the famous Aneke Jans," gives "before anything else to my daughter Blandina a negro boy Hans. To my son Lucas Kierstede my Indian named Ande. To my daughter Catharine Kierstede a

negress named Susannah," and so on. (Will dated July 29, 1692.) It will be remembered that Dr. Johnson's faithful negro servant, Francis Barber, had received the gift of liberty under his former master's will. An instance of testamentary manumission in England occurs in the will (1786) of a curious character, the Duchess of Kingston, who says: "I order that my four musical slaves and their wives, bought of Mr. Douglas at Revel, shall have their liberty six years after my decease." The reference to this subject in Washington's will I cannot presume to quote.

Often it is the circumstances of the will that are suggestive of romance, whether it be the romance of battle or of single combat, or the romance of ordinary life. Thomas Porter, of Tendering Town, in Essex, his right shoulder being wounded in battle in the turbulent times of King Charles I., made his mark to his will July 2, 1644. "In the name of God, Amen. Whereas it hath pleased God I have received a wound which may be mortal unto me, I resign my soul to God in Jesus Christ, for whose cause I came forth willingly to engage myself. My will further is that my debts may be paid out of my stock, and my dear wife, Bennett, and my son, Thomas, may enjoy my lands both what I am now possessed of or what shall fall to me after my mother's decease.—Further I give to these five men that tend me, George Harvey, John Bridge, Isaac Long, Allen Vere, Edward Shermen, I do thankfully bequeath, 1/— apiece to be paid within a month after my decease."

Evidently the wound was mortal, for in the following month the will was proved.

Wills made by duelists in anticipation of single combat, or when wounded after the event, are of particular interest. The will of Lieutenant Colonel Frederick Thomas (1783) when "forced into a personal interview of the most serious kind" has been quoted in my book, and for economy of space must, I am afraid, be omitted here.

Thomas Pitt, Lord Camelford, a man of turbulent nature, "Commander in the Navy and duelist," as our Dictionary of National Biography describes him, met

his end in his 29th year by a duel of his own provoking. He left a curious and romantic codicil written in circumstances which are vividly suggested in the following appended clause: "Signed by Richard Wilson in the presence of and by the express directions of the within-named Thomas Lord Camelford, and sealed, published, and declared this 8th day of March, 1804, by the said Lord Camelford as an explanatory note and codicil (he having written and signed the contents hereof on the 6th of this instant March on two sheets and a half of paper, and being unable to resign the same at the present date), in the presence of us whose names are hereunto written. . . ." The duel, it will be seen, was fought on the 7th of March.

In this codicil Lord Camelford wrote: "There are many other matters which, at another time, I might be inclined to mention; but I will say nothing more at present than that, in the present contest, I am fully and entirely the aggressor, as well in the spirit as in the letter of the word; should I therefore lose my life in a contest of my own seeking, I most solemnly forbid any of my friends or relations from instituting any vexatious proceedings against my antagonist; and should, notwithstanding the above declaration on my part, the law of the land be put in force against him, I desire that this part of my will may be made known to the King, in order that his royal breast may be moved to extend his mercy towards him."

At the inquest the jury returned a verdict of "wilful murder against a person or persons unknown."

Another romantic passage may be culled from this codicil, but even that does not exhaust its contents: "With respect to myself I have ever entertained an anxious desire that my remains may be deposited in some region of the earth distant from the place of my nativity, and where the surrounding scenery will smile upon me; others adorn their abode while living, and it is my fancy to adorn mine when dead. For this purpose I beseech most earnestly that, whenever the times will permit, my body may be removed in the cheapest manner to the Island of St. Pierre, in the Lake of Berne,

in Switzerland, there to be deposited in the center between the three trees that stand on the right of the pavilion. A bush or some such thing may be planted over me, but without any stone or masonry in any shape or form whatever. And for the permission to have this my last wish carried into execution I bequeath £1,000 to be paid to the hospital of Berne, to whom the island belongs. I appoint Devereux my executor for all these things relating to my burial, on which I attach more importance than a sensible man perhaps ought to do. With respect to all my other friends and relations I beg that they will not wear mourning on my account, or show any outward mark of regret at my loss."

In the sequel the embalmed body was placed in the crypt of St. Anne's Church, Soho, in London, the War having prevented its being taken abroad, and there, thrust probably into some vault, it was eventually lost sight of.

I do not know whether the will of John Blackmore (to take one case from common life) has ever been in print before. I came across it quite by chance, but it inevitably struck the searcher's eye. It is nothing more than a curiosity, but it is, so far as I know, unique. John Blackmore, it was deposed, was a clerk in the Bank of England, and the will was found on diligent search in a pocketbook in his desk at his London lodgings, where he had lived until, a few days before his death (28 April, 1761), he was removed to country air. I transcribe the beginning of the will:

"In the Nm of Gd Amen. I Jno Blekmr Ctzn Lndn d mk ths my lst wll in mner fllwng tht s t sy frst I rsgn m sl nt the hnds of Almght Gd m Crtr trstng nly n th mrts and mdtm of X my Svr fr th fr & fill prdn of ll my sns my bdy I rsgn t the erth t b dcently ntrd t th dscrtn of m ex ftrmnd—and s t sch wrldly estt it hh plsd God t blss m wth I gv and dispe of m as flws—"

It is difficult in a short paper to treat this subject to satisfaction, and I find that I have no space to develop that which was mainly in my mind, the romance of ordinary and uneventful lives. Particularly attractive, perhaps, are the recurring romances of death-bed dispo-

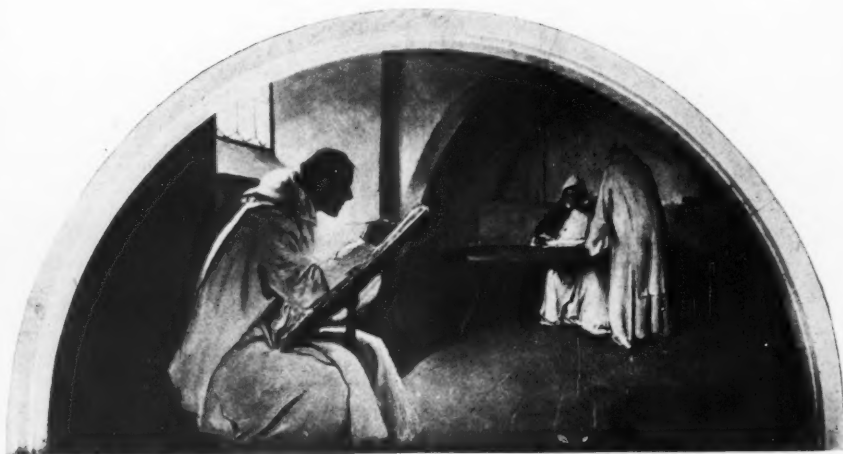
sitions, and the human and legal problems connected therewith. These romances and these problems are often suggested by the picturesque affidavits of surviving friends appended to or embodied in the less formal wills (especially in days when the law was less exacting than now), the language of which is remarkably vivid and minute. But I will cite for its suggestiveness, in conclusion, a passage from a printed source,⁴ and leave the subject there.

"In one case known to us, a most interesting and suggestive phenomenon took place. The patient, who knew that she was dying, was dictating her last wishes—verbally—to those about her. Within a few minutes of her death she became too weak to speak, and requested that a pencil be placed in her right hand, and a pad of paper under the point of the pencil, so that she might write without hindrance. Her hand then proceeded to write out her dying wishes in a perfectly clear handwriting. The hand seemed to possess remarkable strength—

a force of its own—the writing being bold and distinct, and the ideas conveyed were consistent and logical to the end. While this writing was going on, however, the patient completely lost control of her body; the breathing became stertorous, and she passed into a state of seeming unconsciousness. This state grew deeper and deeper, until the patient passed into a condition which might have been pronounced 'death.' The pulse and respiration ceased, to all appearances; the temperature fell; a limpness of the whole body ensued; the face became deathly pale, and yet her right hand and arm continued to write and write, and correct, and give clear and intelligible messages, which could only be interpreted as issuing from a sound and alert consciousness,—in full possession of all its faculties. Where this intelligence resided we cannot say, but there can be no question as to its actual existence during the dramatic scene."

E. Vine Hall

⁴"Death: Its Causes and Phenomena," by Hereward Carrington and John R. Meader. Second ed. (1913), London, William Rider & Son, Ltd.



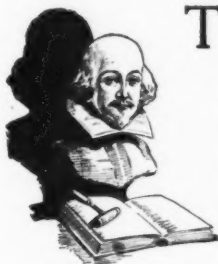
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The Manuscript Book.

The Judgment of Solomon

A REVIEW IN THE LIGHT OF PRESENT PROCEDURE

By A. A. Graham, Topeka, Kan.



THE judgment of Solomon is so often cited as an example of wisdom, certainty, and speed in the administration of justice, as contrasted with the delays and technical failures of the law in our own times, that the application of our procedure and the present construction of the law to that ancient case might serve to reflect a new light much like the setting of an old picture in a new frame.

Solomon Becomes King and Opens His Court.

"David slept with his fathers."

Benaiah, by order of Solomon, "fell upon" Adonijah, Joab, and Shimei, and they died; "and the kingdom was established in the hand of Solomon."

King Solomon then went to Gibeon to sacrifice; there the Lord gave him a wise and understanding heart and both riches and honor; "and he came to Jerusalem, and stood before the ark of the covenant of the Lord, and offered up burnt offerings, and offered peace offerings, and made a feast to all his servants."

The court of Solomon is now established and open for business and here is

HIS FIRST CASE.

The Record.

Appearances:

16. Then came there two women, that were harlots, unto the king, and stood before him.

Plea and statement of case by plaintiff:

17. And the one woman said, O my lord, I and this woman dwell in one

house; and I was delivered of a child with her in the house.

18. And it came to pass the third day after that I was delivered, that this woman was delivered also; and we were together; there was no stranger with us in the house, save we two in the house.

19. And this woman's child died in the night; because she overlaid it.

20. And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom.

21. And when I arose in the morning to give my child suck, behold, it was dead; but when I had considered it in the morning, behold, it was not my son, which I did bear.

Answer of defendant:

22. And the other woman said, Nay; but the living is my son, and the dead is your son.

Replication of plaintiff:

And this said, No; but the dead is thy son, and the living is my son.

Close of testimony:

Thus they spake before the king.

Statement of the case by the court:

23. Then said the king, The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living.

Decision and judgment of the court:

24. And the king said, Bring me a sword. And they brought a sword before the king.

25. And the king said, Divide the living child in two, and give half to one, and half to the other.

Confession of judgment by plaintiff in favor of defendant:

26. Then spake the woman whose the living child was unto the king, for her

bowels yearned upon her son, and she said, O my lord, give her the living child, and in nowise slay it.

Execution sued out by defendant:

But the other said, Let it be neither mine nor thine, but divide it.

Case reversed and judgment for plaintiff and against defendant:

27. Then the king answered and said, Give her the living child, and in nowise slay it; she is the mother thereof.

Case reported:

28. And all Israel heard of the judgment which the king had judged; and they feared the king; for they saw that the wisdom of God was in him, to do judgment. I Kings, III, 16-28.

Brief and Argument.

Statement:

A Case in Replevin, in the cepit and detinet.

Plea, ownership of the property (the child) wrongfully taken and wrongfully detained.

Answer, *Non cepit, non detinet*, I did not take, I have not detained.

Replication, the general issue.

Points of Error.

The evidence:

Of Plaintiff, purely imaginary, not founded on such circumstances as would justify a conclusion, and therefore incompetent to establish the alleged acts of defendant, occurring, as the testimony shows, "while thine handmaid (the witness) slept."

Of Defendant, simply that the living child was hers and the dead the plaintiff's. The alleged substitution is not directly denied.

The judgment, destructive of justice, and conditionally criminal.

The judgment to "divide the living child" meant its death. No court should render a judgment the execution of which would mean the destruction of the value in controversy, as in that case the court would accomplish what the plaintiff sought, by the suit, to avoid; and in the present case the execution of the judgment would also have been an act of manslaughter on the part of the judge.

The judgment not conformable to the evidence of the issue.

To have, in any sense, justified the judgment of equal division in this case, the evidence should have shown equal rights; but, as it was evenly balanced, the judgment, under the law, should have been for the defendant. The property in controversy, however, was indivisible; but the judgment, in any event, should have been, in harmony with the issue, for the possession.

The judgment fortuitous.

The judgment, as first pronounced, was predicated upon a fortuity,—the supposition that one or other of the parties would weaken,—and Solomon placed this eventuality only between himself and manslaughter. Judgments should rest upon the facts established in the case, and not upon contingencies.

The decision in the case against the evidence.

The final disposition, rather than the decision in the case, rested upon the presumption that the natural love of a mother for her child would prompt her to save its life under any circumstances; whereas, the contrary is true, and borne out by the unexceptional examples of history, showing that mothers have always sacrificed the lives of their children as well as their own before seeing them wrongfully taken from them.

The judgment on reversal without jurisdiction.

The plaintiff, by one act and in one breath, (1) abandoned her case, (2) confessed judgment in favor of defendant, (3) and moved the court in arrest. As the matter then stood, defendant held and claimed the child; plaintiff consented to her possession; and there was no question or controversy for settlement before the court.

The execution or final disposition of the case unwarranted.

The reasons last given apply with equal force here: The judgment to "divide the living child" had been arrested; and as no other judgment or modification, on appeal or otherwise, was, at that time, asked by either party, the court was without authority or jurisdiction to

reverse the former judgment, and make the order to return the child to the plaintiff.

Postulate.

To justify the judgment in this case, we must assume a right conclusion from impossible evidence, the testimony of a woman as to what occurred while she slept, on a lack of knowledge of human nature as to what a mother will do when the life of her child is endangered, on a decision, that if carried out, would make the judge a criminal, on an oversight or a positive disregard of the law relating to entreties, on a wrong application of the law when the evidence is evenly balanced, on a controversy not before the court, and without authority or jurisdiction.

The case, while an authority, is, in reality, an impossible precedent.

The judgment is high in respect as an authority, but is impossible as a precedent in fact, in practice, or in law. Such a rule of procedure and principle of evidence, as here announced by Solomon, are impossible of repetition; such a course would necessarily incite all parties

to legal controversies to seek to be first to file disclaimers; and therefore all human rights and liabilities, wrongs and their redress, if not becoming entirely extinct, would necessarily have to be pursued in the negative.

Reforms.

If the deliberate judgments of our courts, after patient hearings, fair trials, full presentations, and careful consideration, are now proving too tardy, or failing, for technical or other reasons, in doing exact justice, it is to be hoped, however, that, neither as a needed reform nor as an experiment, we do not adopt the procedure of King Solomon's court as the model for a new and improved code, where judgments would be rendered, reversed, the case retried and rejudged all at once on the court's own motion, without respect for the contentions of the parties, the nature of the evidence, or the state of the law.

This is what has just now been popularly called, "the tyranny of the courts."



Saw Dust and Law Dust.

To furnish a village with tackle for tillage,
Jack Carter betook to the saw;
To pluck and to pillage this same little village,
Joe Pettifog took to the law.

They angled so pliant for gull and for client,
As sharp as a weasel for rats,
That what with their saw dust, and what with
their law dust,
They blinded the eyes of the flats.

Jack brought to the people a bill for the
steeple,
They swore that they would not be bit;
But out of a saw pit, just into a law pit;
Joe tickled them up with a writ.

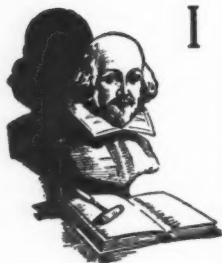
Says Jack, the saw rasper, I see, neighbor
Grasper,
We both of us live by the stocks;
While I for my savings, turn blocks into
shavings,
You lawyers are shaving the blocks.

—From the Kittanning (Pa.) Gazette of
Sept. 14, 1825.

Non in Articulo Mortis

BY HENRY H. DINNEEN

Of the Baltimore Bar



I AM not a lawyer: I know but little of the law, and yet I both despise and fear it. I have had two legal experiences in a life of forty-odd years, and I do not desire any more.

The first occurred some twenty years ago in a state whose name I do not care to mention; the other in recent years. One cost me five years of my young manhood, the other my respect for the administration of justice in this country.

I am going to tell you the whole story in as few words as possible. It is not a pleasant narrative, nor is the end what you or I may think it should have been; but I have a hazy idea lurking in the back of my head that I was given the benefit of what the law styles "a reasonable doubt." However, skimming the legal theorizing,—which is worth nothing either to me or to you, unless you happen to be a lawyer and therefore competent to sneer at my ignorance and vagaries,—and coming down to solid fact, I spent five years in a western prison in the early '90's. I was then a young cub of a civil engineer helping push through one of the main sections of what is now one of the most prosperous railroads in the West. Our headquarters were at Coshacton, a mining camp in a rough section. There was no legitimate amusement there to while away the idle hours between sunset and sunrise. I was young,—twenty-three, full of animal spirits, and always seeking excitement of some kind; you can appreciate the rut into which I drifted,—a poker crowd in the back room of one of the many saloons.

One night, losing quite heavily, I thought I detected the dealer slipping a card to a crony from the bottom of the deck. Out of the five men who saw the "draw" dealt, no other man seemed to note the incident, but I, like a hot-headed fool (which, indeed, I then was), declared with an oath that the game was crooked and that Sam Archer was the man who was doing the cheating. The result was a lively row, in the course of which I hit one of the crowd—Saul Harris—over the head with a stool. The blow fractured his skull and he died; they convicted me of manslaughter and sent me away for five years: for five mortal years Adrian Starkie lost his identity, my name was forgotten, and I became state convict No. 92,386.

During the fifty-odd months which ensued between the time I entered Elmer prison and my release I had ample opportunity for reflection. To the only relatives I had—some maiden aunts in Virginia—I was as good as dead; I realized my mistake and saw that the opportunity which I had had in the West was gone. I knew only railroads in the rough, but I buckled down, bought as many books as I could, and started my theoretical engineering course all over again. I had but one idea,—get out of prison and back to work, striving meantime to keep my "profession" green in my mind.

At last I was out, once again free, and saw the green grass, the trolley cars, and the big buildings of the Middle West. I hated that section of the country; I felt that it had been the curse of my existence, so I took the first train East with some \$75 in my pocket, a trunk with only some books in it, a close-cropped head, and a heart filled with bitterness.

The next five years of my life have no concern with what I have set myself to

put down here in black and white. It is enough to say that six years after I stepped out of prison I was an executive assistant in one of the offices of a "downtown" engineering corporation in New York. The city then was not what it is now; the practical results accomplished by supporting the weight and the walls of a giant building on a steel-girded structure was just gaining a foothold. I saw the possibilities, the vast field which was opening to specialists in that line. I determined to become an expert, to build huge buildings and a huge fortune for Adrian Starkie,—for I still retained my name despite what had happened years before in the West. The name had had nothing to do with my success, but the human vanity which induced me to foster and to nurse my real name came near being my undoing.

In another five years I was the head, the constructive brains of that corporation of ours. Meantime, I had married; there were two children, a magnificent home, and a splendid woman, who knew my history, sympathized with my misfortune, and spurred on my ambition by the pride which she took in my ascent "from the depths."

Then came the beginning of what I thought would surely be the end. One morning my secretary brought in a card across which was scrawled two lines, incoherent and unintelligible. Jenkins said the bearer wished to see me on a matter of importance. He did not know the man, in fact had never seen him before; nevertheless, spurred on by a vague, uneasy sense of impending disaster, I told Jenkins to send him in.

It needed no second glance to tell me that, after eighteen years, my Nemesis had at last run me to earth. My caller was Sam Archer, the crooked dealer of the poker game way back in Coshacton. His errand was simplicity itself; he wanted money, \$10,000, and wanted it at once. He said that he was a curb broker down in Broad street, and that he had come upon hard times; that the money he wanted he needed to keep himself out of the Tombs by reason of some "shady kiting" transactions with his banks. He said, quietly, easily, and with a smile, that he had had his "eye on me"

for five years, but had wished me to attain an eminence of importance in my business so that he could feel safe in approaching me for a loan. I cursed him with great heartiness, and asked him whether he called it blackmail or friendship which spurred him on in his remarkable demand. His answer was blunt and harsh as my condemnation of him had been.

"Either," he said, "I get ten thousand to-day, or I go to the Tombs to-night. In the latter event, New York will know to-morrow all that I know now. The result will hurt you, and your wife, and your family, to say nothing of your business and professional standing—the consequences to you will be far worse than the Tombs will prove to me. Do I get the ten thousand?"

I looked at him for a full five minutes without answering. The blood came up from his flabby neck, mounted to the dissipated face, and settled in the pockets beneath his watery eyes. He met my glance for a few seconds, then lowered his eyes, and traced a pattern on the carpet with a nervous foot.

"Archer," I spoke coldly and without feeling, "you haven't changed in twenty years: the last time I saw you, you were dealing a crooked hand, and you're now in the same business. I am, this once, going to lend you \$10,000; my peace of mind is worth that, but I warn you here and now that I won't stand for it again. If you think I will, try me; but the consequences will fall on your shoulders," and I reached into the pocket of my desk, extracted my check book, wrote an order for \$10,000 payable to "Cash," and handed it to him.

"Now, go," I told him, "and may God help you if you cross my path again;" and the door closed behind him.

In five minutes I realized my mistake. I had been baited and I had fallen into his trap. Having found me willing, so willing, to pay hush money in such a round sum, it would be expecting too much for such a vulture to leave me alone in future. My thoughts turned to my home, my wife, my children; then my eyes rested on a box of mercury on my desk, and a hideous suggestion crossed my mind. I might end it all, then and

there, and thus forever blot out the future as well as the past. Morbid I undoubtedly was, and I even reached over and shook the green tablets against the side of the bottle and was about to draw the cork when the 'phone at my elbow rang.

Five minutes later the Watchman's Tower contract had driven Archer, poison, suicide, out of my head. Then I noticed the bichloride tablets again, and smiled grimly. Opening the bottle, I rolled three of the pellets into the palm of my hand, recorked the bottle, and dropped it into my side pocket. The three tablets I slipped into a small envelop out of which I shook a few pens, and, tucking the flap into the envelop, put the packet in my wallet. That night, I dropped the bottle with the remainder of its deadly contents beneath a subway express as I started uptown.

By this time you will have realized that I must make my living in some manner other than by writing "copy" for the public to read. What you do not grasp, however, is that I had learned more of crime in my five prison years than I could forget in fifty years. I had laid my mind for Samuel Archer,—if there was any more blackmailing, someone was going to pay for it, and Adrian Starkie was not that man.

That night, after having added from my medicine chest a few additional pellets to the supply in my wallet, I slept in comparative peace. To my wife I had said nothing of this specter from the past; I was satisfied to await developments in the solitary contentment that comes with the knowledge that one is prepared to grapple with the enemy at a moment's notice.

Three weeks later I received a 'phone message from Archer. He was sick, he said, and wanted to see me. He was at his home, up near Columbus Circle; wouldn't I drop in and see him that evening as I came uptown, say about 6 o'clock? Would I? Certainly, I told him, and rang off. It was then nearly 5 o'clock; for one solid half hour I sat at my desk and thought, thought till every fiber of my brain ached. Then I acted. Calling Jenkins, I told him I was going over to Newark for a conference at the

United Steel plant and would not be back that evening. Then I slipped on my overcoat, rode down in the elevator, and hurried out into Broadway. A subway train took me to the vicinity of Columbus Circle, and in fifteen minutes I rapped on the door of Archer's apartment, which was on the first floor of an old dwelling. Luckily I had met no one in the vestibule or the hall, and Archer himself, clad in pajamas, opened the door, and I walked into what I took to be his study.

The man's face was white, with deep circles under his eyes, while his gait, as he careened across to a chair behind a flat-topped desk, testified to the fact that he had been drinking. He sank heavily into the chair, planted his elbows on the desk, and rested his flabby jowls in the locked fingers of both hands. For a few moments he regarded me with a drunken stare, as I stood in the center of the room facing him.

He hiccupped with an effort and then grunted in a monotone:

"I need \$25,000 this time, Starkie."

I stared at him in silence for a minute. Then I spoke, hardly above a whisper: "So, cheat, you elect to disregard one warning; you still pursue your old policies, and are willing to take the consequences?"

"U-m-m," was his only response.

I reached in my pocket and brought out my wallet. As I did so the chime of a clock on a neighboring steeple tolled the three quarters of the hour,—5:45. Archer watched me closely as I opened the wallet, evidently anticipating a blank check. His drunken surprise was manifest when I laid the small envelop on the corner of the desk and restored the purse to my pocket.

"What's that for?" he asked, in a husky half whisper.

"To settle our accounts, once and for all, Archer," I answered, and my voice was quiet and easy; "lend me your watch a minute, will you?"

He looked at me in astonishment, then swung his unwieldy body around and lifted a heavily-fobbed time piece from the pocket of his vest swung over the chair back. I took the watch and glanced at the dial; it read 5:46. I raised it to my ear expectantly.

"Why, man," I exclaimed, simulating astonishment as best I could, "your watch has stopped," and I stepped over to the window and glanced at the steeple. As I did so, I pushed the hands around the dial once,—6:45, and turning, walked slowly back towards the desk, twisting the stem of the watch as I did so.

Looking Archer squarely in the face, I spoke evenly, coldly:

"Now, man, to business. I told you once—no more blackmail. You ignored that and my warning; now you must take your medicine," and I drew a small automatic from the right pocket of my overcoat. The fat man's eyes bulged, the hands that supported his head trembled, while the thick, coarse lips quivered nervously.

"Not a word, Archer," I continued, quietly. "I am not going to kill you; you yourself are going to rid the world of that vermin," and I smile grimly when I recall my melodramatic language and attitude. "Here," and I tapped with the revolver the envelop before me, "are half a dozen tablets—mercury, morphine, and hyoscine. Put them in a glass, fill it up with whisky and drink it. The end will be sudden and painless,—you won't live five minutes,—and if you don't do as I say I am going to shoot you through the heart before you get up," and I reached over and tapped him on the chest with the gun, while with my left hand I pushed the envelop towards him. The man's face was ashy, his arms fell with a crash to the desk, while his head slumped down on his breast.

I went on remorselessly,—it was his life or mine, and I felt that mine was worth more than his: "You have exactly sixty seconds." I spoke coldly, without emotion, as, laying the watch on the table, I stepped to the mantel, seized the whisky bottle, and filled a glass at his elbow with liquor. I then picked up the envelop, and, keeping the gun still pointed at his chest, tore the end off with my teeth, and poured the pellets into the glass.

"Drink," I commanded, harshly; "fifteen seconds left—and then," and the weapon still covered the patch pocket of his pajama jacket.

The dull eyes, apathetic, groveling face

that was raised to mine evidently found in my face but one thing—death, and with trembling fingers and a convulsive twitch of the arm, Archer raised the glass to his lips and drained it with a gulp. I wish that time and the pursuing years might efface the memory of that face,—but it has not yet, and quite frequently the horror, the misery, and the awful doubt which stood out on the face of the blackmailer comes back to me in my dreams.

With a quick twist of my wrist, I turned the watch-stem until I heard the mainspring snap, and dropped watch, bottle, and glass at the dead man's feet before closing the door behind me.

In ten minutes I was seated, with six other men, in the window of my club, watching the uptown traffic on Fifth avenue. Seven of us dined there every Friday at 6.30, and we were then waiting the coming of the page.

* * * *

The next afternoon I learned that the public believed me a murderer. I cannot put in plainer words the reason for this belief than the statement of the Star:

"On the floor beside the body was found a glass, a bottle which contained a few drops of whisky, and the dead man's watch, which had stopped at 6:52, the time when the police think the poison was taken. The theory of the police that it was a plain case of suicide received a set-back when the coroner's physician examined the body. On the desk in front of the dead man, on the back of an envelop, were three penciled, scrawling lines:

"'Adn Starkie, engr and Westn . . . poisoned me. I will tell all when I . . . get . . .'"

Archer, in his last few minutes on earth, had smashed, had demolished with a stroke of his pencil my carefully planned alibi: his own watch an hour fast, its mainspring broken, its hand pointing to an hour when I was half a mile away from his lodging, dining at my club.

Jenkins had brought me the paper without glancing at it. I read and reread the all too brief account, topped with

scare heads, the while I wondered why the police had not made some move towards apprehending me. I then had, as I now have, no doubt but that Archer scrawled that message as I stepped over to get the whisky bottle, and that he had done so in the desperate hope of eventually being avenged. According to the paper, the memorandum of the dead man ended in a scrawl, the word following "Western" being but a mere scratch.

An hour later I was closeted with Arthur Cook, of Cowen, Cook, & Cross, the general counsel for our company. I showed him the account in the newspaper, explained that while I was a western man, I had never known Archer; that I had left the office something after 5 the preceding day, intending to go to Newark, had started for the train, but then recalled my dinner engagement at the club, had gone directly there, and then telephoned to Newark. I gave as my reason for consulting him the fact that I was, so far as I knew, the only Adrian Starkie in New York, anyway the only one hailing from the West.

Cook listened attentively, asked me the names of the men with whom I had dined on the preceding night, then laughed and told me to go home and forget the fact that I might be a murderer. I felt then, as I feel now, that that "creepy" story in the newspaper had for the moment shaken his faith in me, and that his attitude and manner was forced and unnatural, and adopted to hide from me a spirit of apprehension on his part.

There the matter stopped for some months, much to my surprise, though of course I never hinted to anyone that I expected to be connected in any way with such a crime. Why I was not immediately indicted and tried without ceremony, I could not understand. Meantime the press, in large measure rabidly antagonistic to me by reason of my corporate affiliations, had been continually and caustically abusing the public prosecutor because of his inaction in the matter. Finally, one of the papers, more enterprising, more ingenious, and more bloodthirsty for a victim, sent some half a dozen men delving into my past life. Needless to say, they quickly unearthed the skeleton which I had buried some

twenty years before,—the fact that I had killed a man and had served five years for it in a western prison. Archer's connection with this affair could not be ascertained, however, because all of the original papers containing the record of my conviction, the names of the witnesses, and the judgment roll had been destroyed when the Coshacton courthouse burned, some fifteen years before.

Needless to add, these disclosures created a furore in New York; they were received amid acclamations of my guilt, and once again the press turned its batteries on the district attorney and demanded my arrest and prosecution. Williams, the county prosecutor, a candidate for re-election and both eager and anxious for the support of the press, yielded to their importunities rather than suffer reverses by reason of the criticism leveled at the conduct of his office, and had a true bill returned, charging me with first-degree murder in having been the cause of Archer's death.

Bitter reflections, indeed, were mine. The cause for which I had killed a man, lied to my lawyer, and deceived my friends, was to my mind now a lost one. The past which I had sought so zealously to hide, to bury in the foundation of what was now a prosperous, a successful career, was to be resurrected, and with it would bring tumbling about my ears the structure of respectability and confidence which I had builded by years of ceaseless application. My business, my family, my good name, even my life, would be snuffed out in the twinkling of an eye,—and I cursed myself for a fool in not having shared a portion of my wealth with Archer in return for peace of mind and continued happiness.

In a large measure, I was to be agreeably surprised. My friends and business acquaintances, almost to a man, stood with me in my adversity. What if I had, in the flush of the hot blood of youth, killed a man in a fight and paid for it? Had I sought to conceal my identity by adopting an alias? Had I denied the accusation when confronted with the crime? No. Why, then, should I be cast down, trampled upon, and cursed as one suffering from some dread, some

loathsome disease, when I had come up out of the depths, scarred it was true, but an honest man and a true—one who had paid in full for an early mistake and had then built Phoenix-like on the foundation of the former man? That I had killed one man was no evidence that I had killed another, and each and every of my friends repudiated with emphasis any suggestion of belief in the truth of the charge contained in the indictment.

I still recall, vividly and distinctly, every incident of my brief trial for murder. My friend Cook went into court, knowing nothing beyond what I had told him the day after Archer's death, supplemented by the statements of the men with whom I had dined on the night Archer died. With every show of confidence, Cook had assured me that I should be acquitted in a day; he believed me innocent and was probably sincere in his opinion of the outcome; but I—I knew I was guilty and was apprehensive out of all reason, as I did not understand how the prosecution could fail in its effort to convict me.

The jury was sworn and the people produced O'Brien, the physician who had performed the autopsy. He said that Archer had died as the result of some powerful poison, taken into the stomach; he had found traces of mercury and morphia; that death had been a matter of but a few minutes after the poison had been introduced into the man's system. Cook excused him without a word.

A policeman was the next witness. He had been called by the janitor of the building where Archer lived at 9 o'clock on the morning following my visit to Archer's apartment. The janitor, entering the suite to set it aright, had found the occupant dead at his desk, the body clad in pajamas. The policeman described the condition of the room in detail,—the exact location of the desk, the whisky bottle on the floor, beside it the watch and glass. These he exhibited to the jury at the request of the representative of the people, the glass, a thick, heavy tumbler, was smeared and discolored; the watch badly dented on one side, the hands pointing to 6:52.

Then cautiously, carefully, as a cat

poaching a mouse, the prosecution approached what I felt was the pivotal point in the case,—the matter of the slip of paper with my name on it.

Had the policeman found anything else near the dead man except that which he had described? He had. When had he found it? About an hour after he reached the apartment, upon the arrival of the coroner's physician. What was it? An envelop with a few lines scrawled on the back, penciled lines, they were; it lay on the desk beneath the outstretched arms of the corpse. Was this the envelop? And the silence in the room was intense, as the prosecutor, holding the paper a few inches from the eyes of the witness, glanced significantly towards the jury. That was the paper, the witness said, and the people's counsel handed it to Cook without a word of comment.

The lawyer at the table looked at the pen-and-ink address on the face of the envelop, and then turned it over with deliberation, glanced at the back of it, and then sent it over for my inspection. The envelop bore the address: "Mr. Saml Archer, The Northland, New York;" and on the back, running, straggling at an angle, were the lines which had seared themselves in my memory four months before when I first saw the facsimile reproduced in the newspapers.

Cook rose to his feet easily and deliberately,—insolently, I thought. He looked not at Williams or the jury, but directly at the court.

"I take it," he began, in an even, conversational tone, "that the people want to offer this," and he shook the envelop in the direction of the jury box. "I would first ask the court to read the peculiar, penciled message on this slip of paper, and I will then be glad to be heard in support of my objection, if the court so desires."

"Hand it up," replied the judge, crisply, and a bailiff carried the envelop to the bench. For a full five minutes my heart stopped beating, while the court scrutinized the writing through steel-rimmed glasses.

"This isn't evidence, Mr. Williams," he said slowly; "if you wish, however, you can make your offer, but I will now

have to exclude this paper from the consideration of the jury."

My heart bounded into my throat, and for a moment I choked with emotion. The prosecutor's voice cold, biting, sarcastic, asking permission to suspend with the policeman's testimony for a few minutes, broke in on my elation.

"Certainly," granted the court, and James Colson, of the Morning Star, took the stand. It was his paper which had unearthed my Coshacton experience and spread it broadcast across the land. Cook regarded him with a look of curious inquiry, while the witness narrated with apparent enthusiasm the manner in which he had worked along my "back trail." He had gotten as far as Coshacton when Cook broke in again—cool, polite, suave.

"If the court please, what has Mr. Starkie's past got to do with this issue (I think that is the word he used)? The people have yet to prove a crime, so far as the traverser is concerned, and it is therefore but irrelevant, indifferent,—the matter of his past life, I mean;" and he sat down abruptly.

The judge stirred uneasily. "Mr. Williams," he said in an even voice, "this indictment charges a felony against the laws of the state of New York, committed within the jurisdiction of this court. You can't prove a crime by the traverser in another state in order to support an inference that the accused is a man of murderous tendencies until you have established by some competent evidence that he has committed a crime here. The people, so far, have proved nothing that is not wholly compatible, as equally reconcilable, with the theory of suicide, as with that of deliberate murder. I will, therefore, exclude at this time all testimony touching the character and

former life of the traverser. Call your next witness."

The prosecutor was on his feet in an instant, his face white with anger, his hands trembling with excitement.

"The people," he began harshly, "rest their case on the testimony of the physician, the policeman, the envelop, and evidence of the past life of the traverser. I again renew my offer of all of this testimony, and urge with respect, with confidence, and in all earnestness, this testimony, particularly the dying declaration of Samuel Archer,—and I do not understand the defense to question the authenticity of the writing; it is conceded that Archer wrote it, is it not?" and Williams frowned down on Cook.

"For the purposes of your offer, we waive that objection," answered Cook, quietly.

"Your motion is denied," put in the judge, quickly. "The declaration isn't competent, because it appears from the paper itself that Archer did not expect to die. You must prove that that statement was written by the man when *in articulo mortis*. Is that all, Mr. Williams?"

"The people rest, sir," and the voice was bitter, the manner stinging. "We have other witnesses, but we cannot call them because of the court's ruling."

"And you, Mr. Cook?"

"The usual motion, your Honor; we ask an instruction of acquittal; does the court care to hear me?"

The gray-haired judge leaned back in his chair and stared intently at the dun-colored ceiling. "No," he said slowly, "No." And he swung around and faced the jury.

"In this case, gentlemen, your verdict must be not guilty; the people have proved no crime so far as the traverser is concerned;"¹ and five minutes later I walked, a free man, into the open air.

I have never asked Cook why the judge did not leave it to the jury to say whether I was guilty or not. But you who are lawyers can probably understand why in this instance law cheated justice. I cannot, and I do not care.

H. H. Bowen

¹ See the following cases, holding that the *corpus delicti* must first be proved, and also that dying declarations are not receivable in cases of the kind referred to, until it is first made to appear that the declarant had abandoned all hope of recovery from the injuries inflicted by the accused and is of the firm belief that his death is inevitable: *United States v. Searcey*, 26 Fed. 435; *People v. Kraft*, 91 Hun, 474, 36 N. Y. Supp. 1034; *People v. Evans*, 40 Hun, 492; *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Reg. v. Mooney*, 5 Cox, C. C. 318; *Reg. v. Megson*, 9 Car. & P. 418.

Feminism and Divorce

By MRS. HORACE GERSHOM POPE

Wife of a Member of the Kansas City Bar

[Ed Note.—This article is written in reply to one of the same title by Mr. Henry Wellington Wack, which appeared in the June, 1914, number of Case and Comment. The writer states that inasmuch as Mr. Wack explained his domestic position, she desires to do likewise: "Happily married thirteen years; husband's mother living with them, to whom she refers as to the kind of daughter-in-law, and mother, she is. Raised younger sister, has had no servant problems, and spent her husband's money to his satisfaction."]



MR. Henry Wellington Wack surely could not have made a very comprehensive study of his subject when he wrote his recent article, "Feminism and Divorce," or he never would have picked the idle,

luxury-loving, extravagant, irresponsible woman as representative of "feminism." This type of woman, being perfectly comfortable herself, is too indifferent to care whether her less fortunate sister labors under sanitary conditions, has shorter working hours, or fair recompense for her toil.

The hysterical extremist, who becomes carried away with herself and makes exaggerated statements, exists, none of us deny, but, has there ever been a great movement among men that did not bring forth its male fanatic, and should the odium for this, and the above-mentioned class, be cast over all the sane, serious-thinking women, who have only one thought in mind in wanting the vote,—a voice in moral issues, and the adjustment of laws unfair to women?

About two years ago it came to my notice that a Mrs. Blank was to be the principal speaker at an afternoon meeting in my neighborhood. I was greatly surprised. I knew her to be a woman in middle life, with two sons in college, and two in high school, and that she should be in the Woman's Movement aroused my curiosity; for at that time, Mr. Wack himself could not have had greater prejudice against "feminism" than I had, but I

knew Mrs. Blank to be all that was womanly and good, and so I went. Could Mr. Wack have heard her address it would have given a jolt to some of his circumscribed ideas gleaned from "the comic press of America, and the turgid editorials of Europe." The burden of her plea was: Make home attractive, convince your husband that you are a rational, sensible, prudent being who only desires to work with him, not against him, for better, safer laws that will safeguard you and your children, and you will appeal to that generous, noble side of his nature for which the men of our country are noted above all others. Don't antagonize, don't nag, don't harp, for only by proving your fitness for what you ask can you be worthy of it. I do not believe even our most unkind opponents could claim anything "vaguely defined or fiercely demanded" in such a line of argument, do you?

Mr. Wack asks: "What has infected the woman of the twentieth century? In the din and madness of her present fight to intermeddle with affairs outside the sphere wherein she labored and idled, ignored opportunity," etc. Just this, my dear sir, lack of results. No one denies that intemperance is responsible for three fourths of all crime, and yet, in spite of this, men have not in all the centuries past succeeded in righting this evil. Is it any wonder that twentieth century woman is aroused to "intermeddle?"

I mention this as a specific instance. It is not any part of my plan to defend "feminism." It stands on its own merits, and needs no defense. I am only raising my voice in protest against the injustice to thousands upon thousands of good women who are heart and soul in

this cause, who do not deserve the capacious appellation of "sterile," "hysterical," "idler," and whose "bosoms are not dead to the plea of childhood."

Continuing, the gentleman says: "From the over-verbiaged war attending this femmeophobia, the philosophic onlooker, with a day's work and actual responsibilities to keep him sane, gains no clear understanding of what the woman's movement aims to achieve."

There! Have I not by the author's own words proven my contention that he undertook to elucidate upon a topic on which he was not fully prepared? How much better it would have been had Mr. Wack, with his genius for vituperative anathema, have turned this energy into a fair and honest investigation of "feminism," met and talked with component forces and individuals throughout the nation, and then kindly, and as one having the good of womankind, and the preserving of the sanctity of the home, at heart, pointed out our errors to us in a spirit of brotherly charity.

Men should not overlook the fact that women are born to their vocations,—housewives and mothers,—while men can choose theirs; and women, being the daughters of their fathers as well as mothers, sometimes inherit a taste or a talent for business, politics, or the professions, which causes them to rebel against prescribed customs, but even so is that not better than the large army of men hoboes? Give women credit for not having invaded that field of man.

Can you honestly say, Mr. Wack, that "feminism" causes divorce? Out of a large acquaintanceship of attorneys I have put the question to each one: "How many divorces have you had as the result of woman's wanting or getting the vote?" In every instance the man has studied a few minutes before replying, and in every case the answer has been the same: "Not any."

Undoubtedly there have been cases, but do you not believe that a husband and wife who would meet with shipwreck over that question would sooner or later have run upon the shoals of some other? Has divorce and dissolution of home been the result in New Zealand, where equal suffrage has endured for twenty years?

Woman has not accomplished as much in the arts and sciences as man, but she has not had equal training, opportunity, or physical endurance; but even so the pages of history are not entirely barren of the achievements of women in any of the lines mentioned. Woman has had the bearing and raising of children for her work, just as she will continue to have despite all alarmists and calamity howlers to the contrary, for the few who want to take and fill men's places are so in the minority, they will scarcely count in the final showing.

"The modes of women's hats and gowns are conceived and dictated by men, not women," says Mr. Wack, and considering the extremes of the present fashions I consider it downright generous of Mr. Wack to admit it. Let us hope if women ever become proficient in this branch they may be able to work some needed reforms.

Quoting again: "The leading and misleading feminist lecturer on the rampage in the United States, a lady who, I warrant, has gowned herself to please man, and enjoyed his respect and admiration,—if nothing more from the brute,—has stated woman's case with authority. She said: 'Women do not want to do men's work; they couldn't if they wanted to; they merely want to do human work.'"

Taking up the matter of dress: Which will you have, reader, the lady who has modestly gowned herself to please man, or the masculine type indifferent to dress? It strikes me our opponent is a bit paradoxical in this paragraph in referring to this "feminine lecturer on the rampage," who has at the same time "enjoyed his (man's) respect and admiration." And as for the work she claims women want to do—Why pervert the meaning of this sincere woman's plea, when he well knows, as do we all, by human work she means engaging in the work of promoting the welfare of human kind?

That real womanhood and real motherhood belong to a past age is no more true than that real manhood does, which it does not. Men to-day are as fine and good as they ever were,—and so are the women; but increase in population, wealth, multiplicity of pursuits, complex-

ity of modern life in general, all have contributed to make it such a different world from the one our grandmothers knew. And who can say that grandma, with her keen perception of right and wrong, might not have been more aggressive than her granddaughter?

Mr. Wack sums up his article scintillating with satirical thrusts at woman and her ideals by telling her to go back to her home and give it the proper management, diffusing harmony, love, and loyalty.

Splendid advice, Mr. Wack, splendid, but what will the men do in return? Will they immediately set about ridding the country of the evils that menace our boys and girls, adjust the laws grossly unfair to women, show a kindly spirit of co-operation in doing it, and cease to be antagonistic and scornful of us for wanting simple justice and fairness? The remedy lies in the hands of men. Will they use it?

Mrs. Horace Erskine Pope.

Equal Suffrage.

The other day, at the end of a moment's conversation about women suffrage, a gentleman of this village closed by remarking to me: "Well, I should be very sorry to see my wife mixed up in politics."

This remark illustrates the idea held by thousands of people—that women who want the vote want to get into politics.

Nothing could be more untrue or unfounded. Personally, I should be sorry to see any of my men friends mixed up in the present-day politics, but that does not mean that I should like to have them disfranchised. I have been a worker for equal suffrage ever since I knew what the word "suffrage" meant,—because it seems a simple right that the members of a society should all have a voice in the running of that society,—but I have never had the slightest inclination to enter politics.

What most of the women want is exactly what most of the men have,—the right to put in their say as to who shall make and enforce the rules of the society in which they live.

The happiest family is the one in which the man and woman at the head are equally capable in their respective lines, where one neither looks up to, nor down upon the other, and when family problems arise, the man and the women confer together, each bringing to the subject a little different viewpoint.

A woman cannot put herself in a man's place, even if she wishes to, any more than a man can be a mother, and so a woman's viewpoint is always different from a man's by the very nature of things.

What would you think if a man were to take his sons into conference, plan and run a home where his wife and daughters live, without consulting the women in the family in any way?

That is exactly what man is doing now in the larger family, the state.

—Edith J. Griswold in *The Hastings News*.

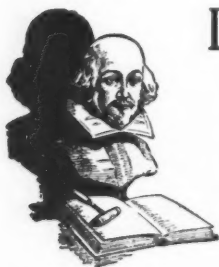
The Trust Problem in the United States

The Amendment of the Sherman Anti-Trust Law

BY PAUL H. DITZEN, A. M., LL.B.

Of the Kansas City (Kan.) Bar

[Ed. Note—This is the final instalment of Mr. Ditzen's comprehensive serial on the Sherman Anti-Trust Law and its Interpretation.]



IT is not proposed to plan a program of legislation for the sole benefit of the consumers, for that would not be serving the public interests properly. The vast army of producers should also be entitled to consideration in a discussion of the conservation of public interests. The man or set of men who invest their capital to promote a certain industry, and who run the risks of success or failure, should be entitled to reasonable profits,—taking into consideration the money invested, the skill and ability required. And the Industrial Commission, in deciding any question of price, would have to take into consideration the profits to which the employer is entitled.

Fair Wages for the Employee.

The laborer, as well as the manufacturer and the consumer, must be considered. Socialists claim that all production is the result of labor, and that the laboring class should be entitled to all that they produce. But such a theory is neither equitable nor just. Ability, brains, and capital invested should be rewarded, as was said before. But the laborer is entitled to his hire. He should receive fair wages for his efforts. He should receive a wage that would enable him to maintain a fair standard of living.

Higher Standard of Living.

As has been said the legislation proposed would have a strong tendency to prevent exorbitant prices. It is believed that prices will be steady, and that they ought to be lowered in some of the big industries which are reaping enormous dividends. Lower prices would mean a better standard of living. Especially would this be true in the case of the laboring classes, whose interests would be guarded in so far that the Commission would see that any increase in prices would be followed by an increase in wages.

The standard of living is a most important factor of the public interests. For wherever pauperism prevails, there is sure to follow degeneracy and crime. And where the masses have sufficient income to enable them to enjoy the advantages of modern civilization, the citizenship will be more enlightened and patriotic. By raising and maintaining a standard of living, America will ever stand as the model for all nations.

Better Quality of Goods.

A strong argument in favor of competition is that manufacturers produce a better quality of goods when each is trying to please the public. When a combination has a monopoly of a certain necessity of life it will not have to strive to please the public by manufacturing the latest styles and contrivances,—the people will have to buy whether the goods are par excellent or not. And it can make the people buy although the goods

are not of the quality of which they are supposed to be. The national pure food act was designed to prevent the adulteration of foods by persons and corporations engaged in interstate commerce. The Industrial Commission, by watching the various industries, will cause them to give the public a better quality of goods than they would otherwise.

The Supremacy of the Government.

The program advanced will subserve the public interests because it will establish the supremacy of our Federal government over these gigantic trusts and monopolies which have the tremendous powers of evil already mentioned. The concentration of wealth and industry has been pointed out. Suppose that this financial power should array itself against the government in a great crisis, might not the government be paralyzed? Have we not as a people already felt this power in times of panic?

It is time that the government, the power of all the people, is asserting its authority against these trusts which represent but the power of a few of the people. The power of all the people surely ought to be stronger than the power of a few, and ought to hold the latter under control. The enactment of the proposed legislation will be but an exercise of the power of all the people for all of the people. This program will not establish paternalism. Freedom of opportunity will be allowed. These combinations will have the right to engage in business to the fullest extent as long as they obey the law.

Commercial Supremacy.

In considering public welfare or public interests, although not essential of the term, still, linked with it is the fact of international commerce. Commerce means business and business means prosperity. If a combination can manufacture and sell great quantities of a certain article, it can afford to pay better wages and charge lower prices. Hence it is to the interest of the American people to develop industries which can supply the markets of the world. Combination is required to do this. If we destroy these great combinations we destroy the na-

tion's commerce. If they are permitted to exist we shall see our commerce grow from year to year.

Along with commercial supremacy comes moral supremacy. As our commercial relations with foreign countries increase, we may expect to see America exerting a greater moral influence in the councils of the world.

Will the Proposed Legislation be Practical?

It is a comparatively easy matter to sketch a program of legislation on paper; it is an altogether different matter to put it into execution and to enforce it. The writer realizes this and knows that any plan will have to be carefully considered before enacted into law. It is also freely admitted that the proposed plan will not be sufficiently comprehensive to meet all of the situations which will arise,—all of the agencies devised by human nature to violate the law have not been exhausted. The law will have to be amended from time to time. That was the case with the Interstate Commerce Act. It was passed in 1887; later on Congress found out that the law was not sufficient and passed the Elkins rate law in 1903, amending and supplementing the old law.

Nevertheless, the program proposed is believed to be practical. While Federal incorporation has not been tried, still incorporation is a mere matter of form in the states in most cases. The Industrial Commission would investigate the business and character of the applicant before the charter would be granted which would force it to comply with the legal requirements.

Little doubt can be entertained as to whether the Industrial Commission will be able to perform the duties herein set forth. Government by commission has vindicated itself in the last decade in the United States. The Interstate Commerce Commission has controlled the railroads. Public Utility Commissions are determining difficult matters such as rates in conflict between the corporations and the consumers. The commission form of government for cities is finding universal favor. The governor of Kansas sent a message to the legislature, favoring a commission form of government for the state.

The work of a Federal industrial commission would be similar to that of a public utility commission. The latter determine whether a railroad or gas rate is fair or unreasonable, and while there may be some differences between regulating a public utility and a manufacturing corporation, this difference is slight.

Men to-day realize that most matters of government are matters of business which require expert knowledge and constant attention to be properly dealt with. Men selected on these commissions are, as a rule, business men of wide experience and education.

Therefore bright hopes can be entertained as to the success of regulation by an industrial or trade commission.

Public Sentiment.

Enlightened public sentiment has come to recognize that the trusts must be regulated by the government. The following quotations show the trend of economic thinkers and men engaged in other walks of life:

Professor J. Lawrence Laughlin, of the University of Chicago, states the theory admirably in his "Industrial America:" "It is the evident purpose of our public to preserve the essential virtues of the competitive system; to allow bigness but to prevent evils; to allow large combinations but to prevent monopoly; to allow managerial power full sway, but to prevent its injury to the rights of private individuals."¹

Professor John Bates Clark says in his "The Problem of Monopoly:" "For the preservation of much that is dear to us we must control the government sufficiently to make it control the corporations, and some day we shall manage to do it. Some day we shall find out what needs to be done, act on the knowledge and compel our legislators to make laws, —not to smash the corporation, as some legislatures have tried to do, but to control them. We shall get the full benefit of their magnificent strength, and make them do good, and not evil. Infinitely harder is it to control them than to smash them, and the task that is set for us is

that of letting them live and work without sacrificing to them our economic and political freedom."²

John Mitchell, one of the sanest and most intelligent labor leaders in the United States, is reported as saying in the Outlook: "Organized labor has no objection to combinations of capital; it believes that freedom to combine is as truly a right of capital as labor. The only proper function of the law in connection with the trusts is to regulate them, to keep their great power under such reasonable restraint as to prevent their oppressing the public or using unfair means to ruin their competitors in trade. They ought not only to be allowed to work as freely as is compatible with the protection of the rights of others, but to be encouraged in reaching out into new enterprises, and to make liberal profits on their invested capital. That is only fair reward of ingenuity and grit."³ Mr. Mitchell goes on record as being in favor of an industrial commission.

Federal incorporation and the establishment of an industrial or trade commission have been recommended by statesmen and leaders of the present day.

Mr. Untermyer recommends an administrative commission to assist in carrying out the decrees and orders of the courts. President Van Hise is strongly in favor of a trade commission, and points out in a succinct way the powers that it should be endowed with.

Many other quotations might be cited. Recently the National Civic Federation issued a volume, "The Opinions of 16,000 Representative Americans of the Trust Problem." A great number of them favored either Federal incorporation, the establishment of a trade commission, or both.

Governmental regulation based upon sound economic principles, advocated by economists, business, and professional men is sure to succeed the present-day methods of solving the trust problem. Congress cannot longer delay the enactment of laws like those recommended for the protection of public interests.

Paul H. Otzen

¹ Laughlin, "Industrial America," p. 138.

² Clark, "Problem of Monopoly," pp. 9, 10.

³ The Outlook, Jan. 13, 1912, p. 80.

Editorial Comment

The abstract and brief chronicles of the time.—Shakespeare.



Vol. 21

AUGUST

No. 3

Established 1894.

¶ Editor, Aaa W. Russell; Business Manager, B. R. Briggs; Advertising Manager, G. B. Brewer.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price \$1.50 a year. Canada, \$1.75; Foreign, \$2.00, 15 cents a copy. Advertising rates on application. Forms close 10th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and "entertaining,"—serving the attorney both in his work and in his hours of relaxation.

¶ Publication of an article does not necessarily imply editorial approval of the opinions expressed therein.

¶ Published monthly, by the Lawyers Co-operative Publishing Company. President, W. B. Hale; Vice-President, J. B. Bryan; Treasurer, B. A. Rich; Secretary, G. M. Wood.

Probably the most important opinion he delivered was that in the St. Louis Terminal case. In the big anti-trust suits he held with the majority of the court in the construction and application of the Sherman law.

The opinion in the Dick duplicating machine case, in which the so-called "patent monopoly" was upheld by a divided court, was prepared by Justice Lurton. He also wrote the court's opinion in the case of the city of Manila, in which the new city was held to be liable for the obligations of the old city of Manila. He also prepared the opinion in the case of the Oklahoma state capitol contest, the anthracite coal case, and a series of cases construing and applying the Carmack amendment to the interstate commerce law limiting the liability of carriers.

Justice Lurton's judicial career began forty years ago when he was appointed to the chancellorship in Tennessee. Later he served on the bench of the supreme court of that state and as United States circuit judge for the sixth judicial circuit. He occupied the last-named position for seventeen years, leaving it to take his seat on the bench of America's highest tribunal on January 3, 1910.

He leaves behind him an enviable record as a gifted and honorable public servant.

Death of Mr. Justice Lurton

THE sudden death of Justice Horace H. Lurton, of the Supreme Court of the United States, creates the first vacancy which has occurred under the present administration.

The unwritten rule of the Senate that the minority representation on the Supreme Court bench shall not be less than three, will doubtless lead to the nomination of a Democratic successor.

Uniform Judicial Procedure

IT is evident that judicial procedure in the inferior Federal courts should be a complete, scientific system, instead of the present patchwork of disconnected statutes, decisions, rules, and common law. This chaotic condition has been most embarrassing to lawyers having occasion to try causes in the Federal courts of other states having a practice different from their own, and has in general caused so much discontent among practitioners and litigants, that the prospect

of a speedy solution of the difficulty is most cheering.

The House Committee on the Judiciary has unanimously reported in favor of the American Bar Association (H. R. 133) after a hearing at which statements favoring the measure were made by Honorable William H. Taft, Honorable Alton B. Parker, Honorable Elihu Root, Mr. Thomas W. Shelton, and Mr. James DeWitt Andrews.

This bill, which authorizes the Supreme Court to prescribe forms and rules, and generally to regulate pleading, procedure, and practice on the common-law side of the Federal courts, should be enacted at once. It creates an ideal system, susceptible of immediate alteration, in the light of suggestions from the bench and bar and of the Supreme Court's own observation of records in appealed cases.

The jealousy with which Congress has regarded the Supreme Court should not militate against this measure. As has been pointed out, "since Congress could repeal the statute at its pleasure, absolute control would continue. Congress merely relieves itself of a responsibility and a duty that time and experience have shown another governmental agency better equipped to perform."

Such a system, prepared by the Supreme Court, would create a model that might eventually prevail in all the states, and, through a complete simplification of all judicial procedure, restore the old-time faith in and respect for the courts.

Proposed Abolition of "One-Judge" System

THE Louisiana Bar Association is urging an amendment to the Constitution of the state, having for its object the abolition of the one-judge method of reaching decisions in the supreme court of Louisiana. Under this method, as stated in the able abstract presented by the committee of the Bar Association of which Mr. St. Clair Adams is chairman, "a case when argued and submitted is allotted for decision to a single justice, who studies the case, reaches a decision, prepares an opinion, and then submits this opinion at a consultation to the other

justices, no one of whom has read either the record or the briefs in the case, or given the case any consideration since the argument, which may have occurred weeks, or even months, before.

"For obvious reasons it is clear that the decisions reached under this system are, in the great majority of cases, decisions by the one justice who has studied the case and prepared the opinion, and in no just sense decisions of the court.

"That this is a vicious system is generally, if not universally, admitted."

It is desired to replace it by the method prevailing in the Supreme Court of the United States, where cases are decided in conference before the opinions are written, predicated upon a study of the transcript and the briefs.

The inauguration of this system will require a reduction of the number of cases in the decision of which each justice shall be called upon to participate and an increase of the working time available to each justice; that is to say, of the time when he is off the bench. It is proposed to effect these results by increasing the membership of the court to seven, and dividing it into two sections, each to be composed of three associate justices and the chief justice.

This movement of the Louisiana bar will be watched with commendation and deep interest by lawyers all over the country.

Mothers' Pensions

LAWS relating to mothers' pensions in the United States, Denmark, and New Zealand" is the title of a publication just issued by the Children's Bureau of the Department of Labor. Miss Julia C. Lathrop, chief of the bureau, in her letter transmitting the bulletin to Secretary Wilson, calls attention to the rapid development of this new type of legislation. Last year more than half of the state legislatures in session had under consideration bills providing for the support of dependent children in their own homes. Twenty-one states now have in operation laws providing aid to mothers in varying sums and under varying conditions. The earliest of these laws

was secured in 1911. "Thus it will be seen," says Miss Lathrop, "that in two years there has come into existence in states embracing half the population of the country a type of legislation whose purpose is admittedly uniform; namely, to secure for young children home life and the personal care of a good mother. No one quarrels with this purpose. On the other hand, the opinions of experts on social betterment do not agree as to the wisdom of trying to secure this purpose through so-called pension legislation, as will be seen by an examination of the discussions referred to in the bibliography. The methods and standards prescribed in the different states vary. It is impossible that all should prove equally valuable in serving their common purpose. At the present time it is impracticable for this bureau to undertake any field study of the operation of these laws (even were it not premature), but in view of the immediate legislative importance of the matter, and of its various bearings, it is believed that the following compilation of American texts, together with the New Zealand law passed in 1911, and a translation of the Danish law passed in 1913, added for purposes of comparison, will prove timely and useful. The bibliography, while not exhaustive, contains most of the significant recent material."

Professional Ethics

Questions submitted recently to the Committee on Professional Ethics of the New York County Lawyers' Association were answered as follows:

Question. Will the committee please advise me of its views respecting the professional propriety of the following advertisement inserted in local papers by an attorney at law, who was formerly the

local attorney for the corporation mentioned therein:

"Having severed all relations between myself and the—Company, I am now in position to accept and prosecute all claims against said company."

(Attorney's signature.)

Answer. In the opinion of the committee, the advertisement is highly improper. It is a direct invitation to prosecute claims against a former client, with the implied suggestion that the new clients will derive some advantage from the former confidential relation.

Question. An attorney brings a suit upon a claim intrusted to him by a client. The debtor thereupon makes certain payments, but promptly, and before the collections are turned over to the client, claims that there has been an overpayment, and demands a return to him of the payments which he has made. The client, being advised of the fact, urges his attorney to account to him for the payments, but the attorney instead presses the case for trial, and meanwhile retains the money to await its determination. Is his course professionally proper, or should he turn over the money to his client upon his demand, or to the debtor upon his demand?

Answer. In the opinion of the committee, the question does not state facts sufficient to enable the committee to form a judgment on the legal rights involved; nor does the committee ever assume to answer questions of law. From the standpoint of professional ethics, the committee (merely from the facts stated) sees nothing improper in the attorney's conduct, assuming that he holds the money in a trust fund in a special account, and does not mingle it with his own funds.





Readers' Comments

The Atherton and Haddock Cases.

Editor CASE AND COMMENT:

I was interested in reading Mr. Joseph Cummings' article on "Foreign Divorces," in your June issue, because of his comment on the two apparently contradictory decisions of the Supreme Court of the United States in *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, and *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1, as to which Mr. Justice Holmes said, in his dissenting opinion in the latter case: "I have tried in vain to discover . . . a distinction between that case (*Atherton's*) and this (*Haddock's*)."

In his treatise on "Domestic Relations and Persons," Mr. Albert Martin Kales, of the Law Department of Northwestern University, makes the point that in the *Haddock* Case the plaintiff was guilty of the wrongful abandonment of the defendant, and that it was on this ground that the court came to a different conclusion to the one at which it arrived in the *Atherton* case. If this be true it is quite evident that the dissenting justices failed to see it. I should like to hear from others in CASE AND COMMENT on this subject.

HENRY A. JEFFERIES.

Indianapolis, Ind.

Law of Louisiana on Prohibited Marriages.

Editor CASE AND COMMENT:

I note in the article by Mr. Frank Keezer, on Marriage and Divorce, reference to the law of Louisiana on prohibited marriages. Mr. Keezer states:

"In Arkansas a woman is forbidden by law to marry her nephew, and should such persons living in that state marry, they would be liable to criminal prosecution, and their marriage is void. But they may cross the state line into Louisiana, where such marriages are legal, get married, return to Arkansas; they are man and wife and cannot be prosecuted."

The Louisiana law on the subject is article 95 of the Revised Civil Code of Louisiana, which reads:

"Among collateral relations marriage is prohibited between brother and sister, whether of the whole or the half blood, whether legitimate or illegitimate; between uncle and niece, aunt and nephew."

This has been the wording of the article since the adoption of a Civil Code in 1808.

By an act of the general assembly, adopted in 1902, article 95 of the Code was amended, and a clause added prohibiting marriages between first cousins, and providing that no marriage contracted in contravention of the provisions of the article, in another state, by citizens of Louisiana, without first having acquired a domicile out of the state, shall have any legal effect in Louisiana.

I have read with much interest the article in the June number; the discussion is timely. The uniform laws on the issuance of marriage licenses proposed by the Committee on Uniform Laws has been proposed in the legislature, which is now in session.

In my opinion the increase in number of divorces is due to lack of restraint in contracting marriage. Too often those who enter that state do so without having at all thought of the future.

BENJAMIN W. KERNAN.

New Orleans, La.

Protection of Property.

Editor CASE AND COMMENT:

Ex-President Taft has made some speeches which certain newspapers repeat as if they were notably wise and philosophic, especially his oft-repeated assertion in favor of the constitutional protection of property rights.

It is a matter of regret that this eminent law professor of Yale is not quite clear in his statements on this subject, as all must believe he is sincere in his utterances. Why should Mr. Taft be constantly urging the constitutional

protection of property rights, when nobody of importance is objecting to that principle, unless we except the Socialists? Even they want to change the Constitution and then obey it.

The question arises: Does Mr. Taft understand what are property rights? Or does he demand constitutional protection of property wrongs? Would he, if living sixty years ago, have demanded such protection for chattel-slave property?

Take the natural resources of this country, for example, all included in the term "land." The land, according to natural law, belongs to the people, but by wrongdoing provided for by wrong legislation it has been gotten away from by the rightful owners. They are disinherited. They have been robbed of their land property. Why does not Mr. Taft come to the aid of those thus despoiled?

Does the ex-President demand that the Constitution shall forever protect some in the wrongful "ownership" of other people's land?

Socialist's demand that the mills, factories, and other products of human industry, which in natural justice belong to those who produced or purchased them, shall be taken from the rightful owners and given to the community. That is a denial of the constitutional right to protection of property in man-made products, privately and rightfully owned by human beings, either singly or united in corporations.

Thus, although the Socialists demand that the people who in natural justice own the land shall be constitutionally protected in that ownership, they oddly insist that those who rightfully own human products shall not have such protection. They are right in one demand and wrong in the other.

The Socialists refuse to make any distinction between the bounties of nature and the products of human industry and enterprise. They include the possession of both under the general term "capitalism." Mr. Taft also fails or refuses to distinguish between the two kinds of property.

The correct theory of constitutional protection is that the rightful owners of land and also of man-made products shall both be protected in their rights, by the Constitution and the laws of the land. When Mr. Taft and the Socialists both accept that standard their demands will command wide attention, and their outgivings will be of great benefit to humanity.

GEORGE WALLACE.

Rockville Centre, L. I.

Liquor Legislation.

CASE AND COMMENT:—

I am an occasional reader of your interesting publication, and being a lawyer, and also

deeply interested in the cause of the extermination of the liquor traffic, I read with much interest the article in the July number, by Lee J. Vance, entitled, "Some Fundamental Errors of Our Anti-Liquor Laws."

To my mind there are about the same number of fundamental errors in Mr. Vance's article that he seeks to point out in the liquor legislation. It is evident that he argues the matter from the standpoint of a man of biased mind; the element of personal prejudice is manifest from his references to "bigotry and fanaticism," and like expressions, together with his attack upon the judiciary for indulgence in "sophistry" and "cheap moral sentiment."

Such expressions savor more of an appeal to the prejudices of a weak jury, than of an effort to submit a great question to the test of reason and right.

Nowhere in his article does Mr. Vance say that what the great judges mentioned said about the evils of the liquor traffic is untrue, but he rests that part of his case by saying that they should not have said it.

Again he plunges into the right of the state to prohibit the liquor traffic, saying, "It is not the business of the moralist to invade the field of law. It is not the business of the jurist to wander into the field of abstract morality." Every law, whether substantive or a rule of procedure, has for its purpose the securing of a right or the repression of a wrong. Right and wrong are essentially moral questions; therefore a man cannot enter the field of law but to deal with questions involving morals. Our government was founded to establish justice and to promote the general welfare; in other words, our government was established to deal with moral questions for the public good.

And in his closing paragraph Mr. Vance passionately appeals for a Jeremy Bentham "to propose decent and honest methods of dealing with the manufacture and sale of alcoholic beverages, and to formulate a rational system of regulating the liquor traffic."

Now, I would ask, if we have no right to prohibit liquor traffic, what right have we to regulate it? The call for regulation implies an abuse, an abuse involves a moral. But Mr. Vance says the moral question has no place in the field of law; therefore he has no more right to disturb the repose of Jeremy Bentham to devise a system of regulation, than Mr. Hobson has to interfere with the mental repose of Mr. Vance, by introducing a measure in Congress to forever prohibit the liquor traffic in the land over which the stars and stripes float, and in which the Constitution of the United States is in force to promote the general welfare. D. C. McMULLEN.

Tampa, Fla.





Among the New Decisions

Of right and wrong he taught Truths as refined as ever Athens heard.—John Armstrong.

Abuse of process — malicious attachment. The bringing of a suit and the making of an attachment therein for the purpose of preventing a conveyance of the property to an intending purchaser is held in *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637, 49 L.R.A.(N.S.) 753, to constitute a malicious abuse of process, for which the person procuring the attachment may be held liable.

There seems to be no similar case involving the question of the abuse of process arising from an attachment of property to prevent a transfer.

Adultery — acquittal of one party — conviction of other. Where a man and a woman are jointly prosecuted for adultery, it is held in the Oklahoma case of *Woody v. State*, 136 Pac. 430, that one of the defendants may be acquitted and the other may be lawfully convicted.

The reported cases which are collected in the note accompanying the foregoing decision in 49 L.R.A.(N.S.) 479, are practically unanimous in holding that acquittal of one jointly charged with a sexual offense is not a bar to the prosecution of the codefendant.

Bill of lading — assignment — passing of title — attachment. Under an agreement by which a bank is to discount drafts for the purchase price of commodities sold, to which are attached the bills of lading, credit the seller with a

certain percentage of the price, and retain the balance to cover interest and expenses, crediting the unused balance to the seller, the title to the property covered by the bill of lading is held in *American Thresherman v. DeTamble Motors Co.* 154 Wis. 366, 141 N. W. 210, to pass to the bank when the discount occurs and the bill of lading is transferred, so that it is no longer subject to attachment for the seller's debts.

The numerous cases on the right of a discounter of a draft as to property covered by a bill of lading attached to the draft are collated in the note appended to the foregoing decision in 49 L.R.A.(N.S.) 644.

Carriers — delay — liability to passenger. In the absence of a special contract it is held in the Georgia case of *Central of Georgia R. Co. v. Wallace*, 80 S. E. 282, that all that a passenger can require of a carrier is that due diligence be used, so that he shall not be delayed for an unreasonable time, and that, when the journey has been once commenced the carrier shall exercise the same diligence in prosecuting the journey with reasonable despatch according to the mode of conveyance and the particular circumstances of each case.

The recent cases are appended to the foregoing decision in 49 L.R.A.(N.S.) 429, the earlier adjudications having been gathered in the note in 32 L.R.A. 543.

Carrier — duty to go back to pick up passenger. A railroad company is held not negligent in the Mississippi case of *Yazoo & M. Valley R. Co. v. Smith*, 64 So. 158, 49 L.R.A.(N.S.) 917, in failing to back an excursion train from which an intoxicated passenger has fallen, to pick him up, where his absence is not discovered until the train has proceeded several miles and the attempt to go back would be dangerous to the passengers on board.

Carrier — injury by article thrown from car by fellow passenger. The general rule is that a carrier is not liable for injuries resulting to one of its passengers from the officious, meddlesome, or negligent act of a fellow passenger, unless such carrier has notice of such acts, or reason to anticipate them, and reason to believe that injury may result from them.

So, it is held in *Pruett v. Southern R. Co.* 164 N. C. 3, 80 S. E. 65, that a railroad company is not liable for injury to a passenger seated at an open window, by splinters of glass from a bottle thrown by a fellow passenger from another window while the train is passing through a rock cut, so that the bottle struck the side of the cut and rebounded into the car.

The recent cases accompany this decision in 49 L.R.A.(N.S.) 810, the earlier authorities having been gathered in a note in 37 L.R.A.(N.S.) 724.

Carrier — lien for C. O. D. charges. That a carrier which, contrary to instructions, advances C. O. D. charges for other than carriage expenses, cannot withhold the property from the consignee to compel payment of such advances, is held in the Indiana case of *Cleveland, C. C. & St. L. R. Co. v. Anderson Tool Co.* 103 N. E. 102, 49 L.R.A.(N.S.) 749, which seems to be a case of first impression concerning the right of a carrier to hold property for C. O. D. advances made by it, either to the consignor or to a connecting carrier, for other than transportation charges or expenses necessarily incident to the carriage of the property.

It will be noted, the carrier had ad-

vanced the C. O. D. charges contrary to instructions from the consignee, who was the owner of the property and claimed not to be indebted to the consignor at all, for the sum demanded on delivery. And under these circumstances, the court said that, while the carrier might hold the property for the costs of carriage, it must look to the delivering carrier or the consignor for its reimbursement of the C. O. D. charges advanced; and that it was not necessary in this case to determine the question whether charges advanced by a carrier on account of claims other than those incident to the continuance of the carriage itself are a lien on the property carried.

Constitutional law — advertising existence of strike. That no constitutional right of liberty or property is interfered with by requiring an employer advertising for help during the existence of a strike to mention its existence, is held in *Com. v. Libbey*, 216 Mass. 356, 103 N. E. 923, annotated in 49 L.R.A.(N.S.) 879, which further determines that such a requirement does not create special privilege, nor is it class legislation or unreasonable.

Contract — in restraint of marriage — validity. A promise by a man to an unmarried woman, that if she continued in his employ and cared for his wants until his death, and did not marry until after his death, his executor would then pay her a specified sum, is held void as an agreement in general restraint of marriage, in *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459, accompanied in 49 L.R.A.(N.S.) 632, by a note on contracts in restraint of marriage.

Courts — jurisdiction — appeal from railroad commission. That jurisdiction of appeals from a railroad commission, which is a mere administrative agency not clothed with judicial power, cannot be conferred upon a court which under the Constitution has such jurisdiction as pertains to a court of appeals, is held in the Mississippi case of *Illinois C. R. Co. v. Dodd*, 61 So. 743, which is accompanied in 49 L.R.A.(N.S.) 565, by a note on the right to appeal to a court from a decision of a railroad commission.

Covenant — adjoining property owners — placing building — enforcement. That equity will enforce against a grantee with notice an agreement between adjoining property owners that an air space shall be left along the division boundary line in placing buildings on the lots, is held in *Cotton v. Cresse*, 80 N. J. Eq. 540, 85 Atl. 600, which is accompanied in 49 L.R.A.(N.S.) 357, by a note on the effect upon a successor to title of an unrecorded agreement, not incorporated in a conveyance, restricting the use of the property.

Damages — failure to forward baggage of orchestra — loss of receipts. A railroad company which makes out an itinerary for an orchestra which is to give concerts on the road is held liable in the Wisconsin case of *Altschuler v. Atchison, T. & S. F. R. Co.* 144 N. W. 294, for loss sustained in failing to forward the baggage car in time for a *matinée* performance at a certain place, although it did not know that such performance was scheduled, if the itinerary provided for the orchestra's arriving there in time for such performance.

The recent cases on measure of carrier's liability for preventing an exhibition or show by a breach of a contract of carriage accompany the foregoing decision in 49 L.R.A.(N.S.) 491, the earlier adjudications having been presented in 4 L.R.A.(N.S.) 569.

Damages — illness of widow and children of deceased — evidence. The only case dealing with the admissibility, in an action for the death of decedent, of evidence of illness or disability of members of his family subsequent to his death, seems to be the California case of *Simoneau v. Pacific Electric R. Co.* 136 Pac. 544, 49 L.R.A.(N.S.) 737, holding that although evidence of the crippled condition of children at the time of their father's death is admissible in an action for causing his death, on the question of damages, for the purpose of measuring their pecuniary loss, evidence that the children had suffered from various diseases since their father's death, and that the widow lately had not enjoyed such good health as at the time of her husband's death, is incompetent.

Damages — injury to growing crops — measure. The measure of damages for the impairment of growing crops by the emission of sulphurous fumes is held in the Alabama case of *International Agricultural Corporation v. Abercrombie*, 63 So. 549, which is accompanied in 49 L.R.A.(N.S.) 415, by the recent cases on the question, the earlier decisions having been collected in notes in 12 L.R.A.(N.S.) 267, 27 L.R.A.(N.S.) 168, and 37 L.R.A.(N.S.) 976,—the difference in the yield and the prices of the crops with and without the presence of the fumes complained of.

Damages — mitigation — duty of lessee to dig ditch. That a lessee of a farm is under no obligation to dig a ditch to protect his crops from water obstructed by a railroad embankment, in order to minimize the injuries, is held in the Mississippi case of *Yazoo & M. Valley R. Co. v. Sultan*, 63 So. 672, annotated in 49 L.R.A.(N.S.) 760.

Disorderly house — time as element. That time is not an essential element of the offense of keeping a disorderly house, and that it is not necessary to prove the commission of the offense within the time laid in the indictment, is held in *State v. Dufour*, 123 Minn. 451, 143 N. W. 1126, annotated in 49 L.R.A.(N.S.) 792.

Domicil — right of minor to change. That a minor cannot change his own domicil is held in *Sudler v. Sudler*, 121 Md. 46, 88 Atl. 26, which is accompanied in 49 L.R.A.(N.S.) 860, by a note on the question of domicil of infants.

Evidence — character — negating fraud. In an action on a life insurance policy where one of the defenses set up in the answer was that the insured had falsely and fraudulently answered certain questions propounded to him in his application for insurance, it is held erroneous in *Great Western L. Ins. Co. v. Sparks*, 38 Okla. 395, 132 Pac. 1092, annotated in 49 L.R.A.(N.S.) 724, to admit evidence to the effect that the general reputation of the insured for being a truthful and honest man in the neighborhood in which he resided was good, for the pur-

pose of rebutting direct evidence tending to establish the allegation of fraud.

So, in an action to set aside a compromise for fraud, it is held in *Wilson Lumber & Mill. Co. v. Atkinson*, 162 N. C. 298, 78 S. E. 212, 49 L.R.A.(N.S.) 733, that proof of the good character of the one accused of fraud cannot be considered as substantive evidence against its existence.

Evidence — declarations of decedent — admissibility. Evidence of declarations of one in possession of a stock of goods, claiming ownership in himself, made in the absence of rival claimants, is held in *Freda v. Tischbein*, 174 Mich. 391, 140 N. W. 502, annotated in 49 L.R.A.(N.S.) 700, to be inadmissible against them after his decease to prove ownership, either as *res gestæ* or verbal acts explaining and characterizing the nature of the possession.

So, upon the question raised after their death, as to whether an article of furniture belonged to a man or his wife, evidence is held inadmissible in *Hopkins v. Heywood*, 86 Vt. 486, 86 Atl. 305, 49 L.R.A.(N.S.) 710, that she, while it was in her possession, referred to it as her mother's, since this does not characterize the nature of the possession, but only the source of title.

Evidence — physician's examination of wife — prosecution against husband. The rule forbidding a woman to testify against her husband is held in the Texas case of *Edwards v. State*, 160 S. W. 709, annotated in 49 L.R.A.(N.S.) 563, not to prevent evidence of the result of a physician's examination of her person to be given in a prosecution against him for perjury in a proceeding to secure a divorce against her for malformation, although the examination is made at her instance.

Evidence — receipt of letter — presumption. Proof that "demand was made by mail" is held in the New Mexico case of *Feder Silberberg Co. v. McNeil*, 133 Pac. 975, annotated in 49 L.R.A.(N.S.) 458, to imply a prepayment of postage and a deposit of the demand in a United States postoffice; but that the letter was

properly addressed to the addressee at the place where he resides or receives his mail is not thereby implied, and proof of that fact must be had before the receipt of the letter by the addressee will be inferred.

Evidence — shock from rail — inference of negligence. Evidence that a horse, while being driven along the street, stepped on a rail of a street car track, that a spark came from the rail, that the horse stopped suddenly, went backward a little, and then fell and died, and that there were characteristic traces of a fatal electric shock upon the organs of the horse, when coupled with evidence that there would be no dangerous current of electricity in the rail unless there was some defect,—is held sufficient in *St. Louis v. Bay State Street R. Co.* 216 Mass. 255, 103 N. E. 639, 49 L.R.A.(N.S.) 447, to warrant a jury in inferring negligence on the part of the street railway company.

Evidence — to apply qualified indorsement. Parol evidence is held admissible in *Goolrick v. Wallace*, 154 Ky. 596, 157 S. W. 920, 49 L.R.A.(N.S.) 789, to show that the words, "without recourse," written on the back of a note between the signatures of the payee and a stranger, were intended to qualify the payee's indorsement, where the statute provides that a qualified indorsement may be made by adding to the indorsing signature the words, "without recourse." There can be little doubt as to the correctness of this decision, since the application of the parol-evidence rule would result in the very thing which that rule is intended to prevent, *viz.*, in fastening on a party a contract which he never made. It cannot be said that it is varying the written contract of the indorser to permit him to show that the words, "without recourse," applied to and qualified his indorsement, but rather it is to permit him to show what the written contract was.

Exemptions — automobile as a "vehicle." As yet there are but few cases which have considered the question of the exemption of automobiles from seizure for

debt. This question, however, will probably frequently arise in the future, and no doubt the subject eventually will be covered in many states by express legislation.

The recent Iowa case of *Lames v. Armstrong*, 144 N. W. 1, annotated in 49 L.R.A.(N.S.) 691, holds that an automobile is a vehicle within a statute exempting to certain classes of persons a team and wagon or other vehicle used in earning a living.

False pretense — representation as to soundness of horse — effecting trade. Effecting a horse trade by declaring the soundness of the horse to be traded with knowledge of the falsity of the statement, with intent to cheat and defraud, is held in the South Carolina case of *State v. Stone*, 79 S. E. 108, annotated in 49 L.R.A.(N.S.) 574, to bring one within the operation of a statute making guilty of a misdemeanor one who, by false pretenses or representations, obtains from another person any chattel or other property with intent to cheat or defraud any person of the same.

Health — power to prohibit handling of milk except in sealed receptacles. A regulation of a local board of health requiring milk to be handled only in transparent glass bottles or other approved receptacles of similar character, thoroughly clean and sterile, and filled and sealed in a milk house or creamery of approved sanitary condition, is held in *Board of Health v. Kollman*, 156 Ky. 351, 160 S. W. 1052, 49 L.R.A.(N.S.) 354, to be within the powers conferred by statutes empowering such boards to inaugurate and execute such sanitary regulations as they may consider expedient to prevent the outbreak of cholera, smallpox, yellow fever, scarlet fever, diphtheria, and other epidemic and communicable diseases, and to examine into all nuisances, sources of filth, or causes of sickness, that, in their opinion, may be injurious to the public health.

Highway — plowing in street — liability of municipality. That a city given control of its streets and charged with the duty of maintaining them in a safe condition cannot, by any permission it may give to

individuals to plow the streets and to remove earth therefrom, avoid liability for injuries resulting to travelers from the negligent manner in which the work is done or the dangerous condition in which the street is left, is held in *Tepper v. Wichita*, 90 Kan. 718, 136 Pac. 317, annotated with recent cases in 49 L.R.A.(N.S.) 844, the earlier authorities having been presented in 19 L.R.A.(N.S.) 506.

Husband and wife — supply of necessities — charity — effect. Whenever a husband, without just cause, neglects or refuses to provide for the support and maintenance of his wife, and thereby places her in such a situation that she stands in need of the necessities of life, it is held not material in *State v. Waller*, 90 Kan. 829, 136 Pac. 215, that they are supplied by her own labor or by sympathizing relatives, friends, or strangers, so that she does not in fact suffer from the privation. He is guilty if he leaves her in such circumstances that, without her own efforts or outside help, she would lack the necessities of life.

It is held in this case that the words, "in destitute or necessitous circumstances," mean needing the necessities of life, which cover not only primitive physical needs, things absolutely indispensable to human existence and decency, but those things, also, which are in fact necessary to the particular person left without support. This decision is accompanied in 49 L.R.A.(N.S.) 588, by the cases on what amounts to nonsupport by a husband within criminal statutes.

Infant — dependent — power of state. The state, as *parens patriae*, is held in *State ex rel. Stearns County v. Klasen*, 123 Minn. 382, 143 N. W. 984, 49 L.R.A.(N.S.) 597, to have the power to assume or provide for the custody and control of a child upon the sole ground of the financial inability of the parent to support it, whenever the breach of the parental trust thus involved constitutes a menace to the fundamental welfare of the child.

This seems to be the first case to pass on the validity of what is generally termed a mothers' pension law; although statutes of this type have recently been enacted in other states.

Insurance — constitutionality of statute inhibiting assignment of life policy. There seems to be little authority upon the question of the constitutionality of statutes forbidding a change of beneficiaries in insurance policies. The Wisconsin case of *Boehmer v. Kalk*, 144 N. W. 182, annotated in 49 L.R.A.(N.S.) 487, holds that a statute which operates to deprive the insured of his absolute power of disposition and control of an insurance policy on his life is, so far as it applies to insurance existing at the time of its passage, unconstitutional as depriving the insured of a vested property right.

It is the general rule that the insured has no right to change the beneficiaries designated in ordinary life insurance policies, unless this right has been expressly reserved by the contract of insurance. This rule, however, was never adopted in Wisconsin, but, by the early decisions in that jurisdiction, it was established that the insured had an absolute right to change the beneficiary at any time.

Insurance — provision for concurrent policy — construction. A clause in a fire insurance policy permitting concurrent insurance is held in *Globe & R. F. Ins. Co. v. Alaska-Portland Packers' Asso.* 123 C. C. A. 340, 205 Fed. 32, to cover policies written by marine insurance companies upon the property, although they render the insurer liable only in case of total loss, and the method of adjustment is different from that of fire policies, if they are concurrent in time and as to property covered.

The question as to what is concurrent insurance is treated in the note accompanying the foregoing decision in 49 L.R.A.(N.S.) 374.

Intoxicating liquor — tie vote — effect. Whenever an election is duly held under article 19 of the Constitution "to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited" in a county, and a majority vote of those voting at the election in the county is cast in favor of the sale of liquors, etc., therein, and in one election district of the county the vote is a tie, it is held in the Florida case of *Yent v. State*, 63 So. 452, annotated in 49 L.R.A.(N.S.) 1204, that the sale of liquors, etc., in such election dis-

trict, is not thereby prohibited, since a majority vote was not cast in such election district in favor of prohibition as contemplated by article 19 of the Constitution.

It does not seem to be controverted that a tie vote at a local option election results in a resumption of the original status fixed by constitutional or statutory provision.

Landlord and tenant — eviction — closing windows. Does the closing of openings in a party wall by the adjoining owner amount to an eviction of the tenant of the other adjoining owner? This unusual question was presented in *Holden v. Tidwell*, 37 Okla. 553, 133 Pac. 54, annotated in 49 L.R.A.(N.S.) 369, which holds that an assignee of a lease in which there is no covenant for quiet enjoyment, except that implied in law, is not evicted by the act of another owner erecting a building on the adjoining lot, and in the course of its construction closing the windows in a party wall so as to cut off the light and ventilation formerly enjoyed by the tenant.

Larceny — obtaining title to realty by false representations. Land is held in the Washington case of *State v. Klinkenberg*, 136 Pac. 692, not to be such property as may become the subject of the offense defined by a statute which declares that every person who, with intent to deprive or defraud the owner thereof, shall obtain from him the possession of or title to any property, by any fraudulent or false representation, shall be guilty of larceny.

A note on real property or things savoring of realty as the subject of larceny accompanies the foregoing decision in 49 L.R.A.(N.S.) 965.

Libel — in will — remedy. What is to be done with a testamentary libel? A testator, with deliberate malignity, contrives an act bound to do injury to the character of another, and which shall remain imbedded in the public records. Is there any remedy or escape? Is it to be endured as *damnum absque injuria*? Can we exact damages from the estate? Or can the probate court grant relief by

eliminating the libelous portion of the will from the probate? Relief by the probate court raises a grave question of judicial power, and at the most cannot afford a satisfactory remedy. The Tennessee case of *Harris v. Nashville Trust Co.* 162 S. W. 584, annotated in 49 L.R.A.(N.S.) 897, holds that an action lies against the executor as such for the probate of a will charging another with illegitimacy.

License — invalid fee — recovery. Where money paid by mistake of law may be recovered, money paid for a license to sell soft drinks under an ordinance supposed to be valid, which payment might have been enforced by fine and imprisonment, is held in *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751, to be recoverable, and action by the licensee under the license is immaterial, since, the ordinance being invalid, the license was not necessary to protect the licensee from prosecutions for making sales. The recent cases on the right to recover back a license fee unlawfully exacted under color of authority are appended to the foregoing decision in 49 L.R.A.(N.S.) 387, the earlier adjudications having been collected in 22 L.R.A.(N.S.) at pages 862 and 872.

Master and servant — automobile testing track — safety. An automobile manufacturer who maintains a curved testing track is held not bound in *Blick v. Olds Motor Works*, 175 Mich. 640, 141 N. W. 680, annotated in 49 L.R.A.(N.S.) 883, to pitch the track at the curves so as to be safe for the maximum speed which the cars must attain, if there are sufficient straight stretches to test for that speed.

Master and servant — car conductor — uneven track — assumption of risk. A conductor on a street car whose duties require him to be on the running board at the side of the car is held in *Luebben v. Wisconsin Traction, Light, Heat & P. Co.* 154 Wis. 378, 141 N. W. 214, to assume the risk of injury from a depressed or uneven place in the track which causes the car to jolt every time it passes the place, and which he has passed over

many times daily for more than a month. The recent cases on assumption by a train employee of risks due to defects in the track or roadbed are appended to the foregoing decision in 49 L.R.A.(N.S.) 517, the earlier adjudications having been collected in 28 L.R.A.(N.S.) 1255.

Master and servant — injury to servant by flood — liability of master. That a railroad company may be liable for injury to one of its train hands through the overturning of the train consequent upon a washout of track by an unprecedented flood, if, from the surroundings, an ordinarily prudent person would have anticipated danger from high water unless culverts or outlooks were provided through the embankment, the existence of which would have prevented the injury, is held in *Louisville & N. R. Co. v. Peck*, 152 Ky. 6, 153 S. W. 39, annotated in 49 L.R.A.(N.S.) 198.

Municipal corporations — ordinance regulating location of retail store. An owner of land is not to be restricted in carrying on business on his premises so long as he does not interfere with the safety and welfare of the public. This principle is affirmed in no uncertain terms in *People ex rel. Friend v. Chicago*, 261 Ill. 16, 103 N. E. 609, annotated in 49 L.R.A.(N.S.) 438, which holds that an ordinance making it unlawful to locate, build, or construct any retail store in any block used exclusively for residence purposes without the written consent of a majority of the property owners, according to frontage, on both sides of the street in the block in which the building is to be located, cannot be sustained as an exercise of the police power, there being nothing inherently dangerous to the health or safety of the public in conducting a retail store.

Negligence — law of the road — vehicles meeting each other. A statute requiring vehicles meeting each other on the public roads to turn to the right is held in the Iowa case of *Hubbard v. Bartholomew*, 144 N. W. 13, 49 L.R.A.(N.S.) 443, to apply not only to vehicles passing in opposite directions, but to vehicles coming together in such a manner that

there would be an actual collision or an apparent danger of one if they should pursue their course without change of direction.

Party wall — maintenance of openings in. It is generally held that one of the owners of a party wall has the right to close any windows or other openings which may exist in the wall, and this right is inherent in the ownership of the wall, and is not dependent upon the desire of such owner to make use of the wall. In a few jurisdictions this rule is apparently limited somewhat. Thus it is held in *Reynolds v. Union Sav. Bank*, 155 Iowa, 519, 136 N. W. 529, annotated in 49 L.R.A.(N.S.) 194, that equity will not require the removal of so much of a wall, built as a party wall, as rests upon plaintiff's land, because of the existence of openings therein; but will merely decree that if at any time he shall desire to utilize the wall for building purposes the other owner shall close all apertures therein at his own expense.

Here the court apparently took the view that the right of one party to close openings in a party wall was dependent upon the desire of that party to use the wall, so that the rights of the plaintiff, who sought, among other things, to have certain openings in a party wall closed, were sufficiently conserved by the decree of the lower court which required that whenever the plaintiff desired to use the wall, the defendant must close the openings at his own expense.

Prostitutes — females — who are — married women. The word "female" as used in chapter 87 of the Laws of 1909, which provides that "any female who frequents or lives in houses of ill fame, or who commits fornication for hire, shall be deemed a prostitute and shall be guilty of a misdemeanor," is held in the North Dakota case of *State v. Phillips*, 144 N. W. 94, 49 L.R.A.(N.S.) 470, to include a married as well as an unmarried woman. This seems to be the first case which has passed upon this question.

Public improvements — faulty plans — effect on obligation to repair. A paving contractor is held in *Cameron-Hawn Re-*

alty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162, not relieved from liability on the portion of the contract requiring him to keep the pavement in repair for a specified time, by the fact that he fully complied with the specifications in performing the work, and that the repairs were necessitated by the faulty plans adopted for the improvement. The recent cases accompany this decision in 49 L.R.A.(N.S.) 922, the earlier authorities having been presented in 9 L.R.A.(N.S.) 154.

Railroad — crossing — recognition. Although a railroad crossing may not be upon a public highway, yet, if the track has been used by travelers as a public crossing for a long time without objection, and the company has treated the same as a public crossing, it is held in the Oklahoma case of *Midland Valley R. Co. v. Shores*, 136 Pac. 157, annotated in 49 L.R.A.(N.S.) 814, that it will be presumed to be such, and the railway company is bound to exercise ordinary care to prevent injury to persons using the same. It may be safely stated, as the weight of authority, as well as apparently the better reasoning, that where a road which crosses a railroad is apparently open to the public, and is used by it, with the assent or acquiescence of the railroad company, it is its duty to give signals for the benefit of travelers on the highway when approaching such crossing.

Railroad — right of way — consideration — passes — invalidity — duty to make payment. A railroad company whose contract to give annual passes in consideration of a right of way is invalidated by statute, after it has taken possession of the right of way, is held bound in *Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 160 S. W. 759, annotated in 49 L.R.A.(N.S.) 848, to compensate the grantor in cash for the value of the property taken less the value of the passes already received by him.

Sale — mutuality — right to refuse goods for unforeseen reason. Want of mutuality is held in *Rehm-Zeiher Co. v. F. G. Walker Co.* 156 Ky. 6, 160 S. W. 777,

49 L.R.A. (N.S.) 694, to prevent enforcement of a contract to sell a specified quantity of whisky each year for several years under a private brand to a concern which has established no trade in such brand which would fix, with any degree of certainty, the quantity necessary to supply the demand, where the contract provides that if for any unforeseen reason the buyer cannot use the whole amount named he shall be released from the contract for the amount desired.

The point made in the above case that a contract is lacking in mutuality where, by its terms, no liability is imposed upon the purchaser to take any of the property specified in the contract of sale, is clearly in accord with the great weight of authority on the question.

Slander — charging teacher with courting pupils. That a charge that a school teacher kept the girls in after dismissing the boys, gave them candy and courted them, is actionable *per se* as tending to prejudice him in his profession of teacher, is held in *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610, annotated in 49 L.R.A. (N.S.) 1033. The few cases passing upon the effect of insinuations of misconduct by a teacher with his pupils sustain the foregoing decision in holding the publication of such insinuations to be libelous, in the absence of circumstances making such language privileged.

Street railway — right of way — vehicle from connecting street. A street car is held in *Moore v. Rochester R. Co.* 204 N. Y. 309, 97 N. E. 714, annotated in 49 L.R.A. (N.S.) 505 not to have the paramount right of way over a vehicle coming from a side street which connects with, but does not cross, the street on which the tracks are laid, if the vehicle is required to cross the tracks to comply with the rule of the road before proceeding along the street containing the tracks.

Venue — obtaining money by false pretenses. The courts of a county in which a letter containing false representations was written, and in which a check obtained in consequence thereof was deposited in a bank to defendant's credit, are held in the Iowa case of *State v. Smith*,

144 N. W. 32, annotated in 49 L.R.A. (N.S.) 834, to have jurisdiction of a prosecution for obtaining money by false pretenses, the crime having been committed partly in that county; though the check was mailed from another state and drawn upon a bank in another county.

Water — flood — breaking ice jam — liability. A railroad company, it is held in the Montana case of *Wine v. Northern P. R. Co.* 136 Pac. 387, annotated in 49 L.R.A. (N.S.) 711, cannot evade liability for injury to lower riparian property by breaking an ice jam where its road crosses a river, the effect of which is to cast upon the lower property water which has been thrown out of the river bed to the peril of the roadbed, and returns to it in such quantities as to overflow the banks below the railroad bridge, on the theory that the water is surface water which the railroad may fight as a common enemy.

Will — restraint of marriage — validity. A gift to testator's widow of all his estate for life, except that in the event of her remarrying the provision for life estate shall immediately cease and a division of the property take place, giving her a certain share in fee, is held in *Re Fitzgerald*, 161 Cal. 319, 119 Pac. 96, not a condition in restraint of marriage within the meaning of a statute making such provisions void, but providing that it shall not affect limitations which only give the use until marriage. Although the policy of the law is as much violated by saying that a donee shall enjoy the gift only until marriage as by saying that the gift shall become forfeited upon the donee's marrying, and the rule as to restraints upon marriage would seem logically to be just as much violated in the one case as in the other, and although the doctrine has been criticized upon the ground that whether the restraint is by limitation or condition, is, in the vast majority of cases, the effect of accident, depending on the turn of expression used, it is nevertheless so firmly established that even the courts which have criticized the doctrine have not thought proper to decline to follow it. The cases on provisions in restraint of marriage in a deed

or will as a condition or a limitation are gathered in the note to the foregoing case in 49 L.R.A.(N.S.) 615.

Will — restraint of marriage — validity. A provision in a will giving property to daughters, that in case of the marriage of either her share should go to the other, and in case of the marriage of both, the property should be divided equally among all of testator's children, is held void as in restraint of marriage in *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, annotated in 49 L.R.A.(N.S.) 605. The result reached in *Sullivan v. Garesche* rests on the assumption that a condition in total restraint of marriage is necessarily void, irrespective of the purpose of the testator in imposing it. That this assumption is too broad may be demonstrated by an inquiry into the history of the rule and the reasons adduced in its support. The truth of the whole matter seems to be this: That public policy does not condemn all restraints upon marriage, but only those that are unreasonable,—in other words, that public policy also recognizes the right of a donor to annex conditions to the enjoyment of his bounty so long as he does not do so out of caprice or malevolence, but has reasonable grounds for so doing. An analogy between the law of restraints on marriage and the law of restraints on trade may here be suggested. Seen from this point of view, the exceptions by which the courts have confined the operation of the rule assume their true character of artificial means of keeping the rule within its proper bounds; that is to say, a restraint is valid where expressed in the form of a limitation, because in that form the purpose of the donor is clearly seen to be, not to vent his caprice upon the donee, but to provide for the donee during celibacy; while a restraint upon a widow's freedom to marry is valid, because ordinarily such action on her part may jeopardize the interests of the children of the former mar-

riage. The clearer sighted among the judges have already come to see that the validity of the restraint does not depend upon whether it is total or partial, or whether it is in the form of a condition or a limitation, but upon whether, in view of the circumstances of each case, the provision there in question subserves a legitimate purpose. Such a test if applied in *Sullivan v. Garesche* might well have led the court to a different conclusion.

Witness — attorney. With the exception of a few Georgia cases decided under the influence of a statute, the authorities in this country are practically unanimous in holding that no matter how gross a violation of professional etiquette it may be for an attorney to appear as a witness in his client's cause, yet there is no legal objection to his so doing if he wishes, assuming that there is no other ground of disqualification, e. g., interest. That a party acting as his own attorney may testify as a witness in the case is held in *Kaesar v. Bloomer*, 85 Conn. 209, 82 Atl. 112, 49 L.R.A.(N.S.) 422.

The only reported case found where an attorney at law was the party to the suit is *Thresher v. Stonington Sav. Bank*, 68 Conn. 201, 36 Atl. 38, which is referred to and set out in *Kaesar v. Bloomer*, and which held that such a witness was competent, but that the practice should be discountenanced.

Witness — eavesdropper — "cutting in" on telephone. One is held not disqualified as a witness in the Oregon case of *DeLore v. Smith*, 136 Pac. 13, 49 L.R.A.(N.S.) 555, because he gained his information by "cutting in" on a telephone over which others were conversing, and who was therefore an eavesdropper. This appears to be the only civil case in which the admissibility of evidence was questioned on the ground that it was obtained while eavesdropping or spying, irrespective of any other objection to the evidence.

Recent English and Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in *British Ruling Cases*.]

Bills and notes — form of assignment — order for payment of debt due. The payee of certain promissory notes addressed a writing to the maker, requesting him to pay the amount of the note to her sister. The sister thereafter gave the notes and writing above mentioned to her niece, also signing a similar writing. Upon this state of facts it was held in *Tyrrell v. Murphy*, 30 Ont. L. Rep. 235, that such writings were not simply an order to collect the money which was revoked by the death of the signer, but constituted a valid assignment of the debt, entitling the niece to recover the amount of the notes, with interest, although the notes were not indorsed, and though no notice of the assignment was given until after the date of the death of both the assignors.

Brokers — commissions — instructions to find tenant or purchaser — subsequent sale to tenant — efficient cause of sale. The act of a broker employed to find a tenant or purchaser of certain property is not the effective cause of a sale of the property three years later, and at a less price than originally fixed, to a tenant introduced by him; and he is therefore not entitled to a commission thereon. *Nightingale v. Parsons*, 83 L. J. K. B. N. S. 742.

Contract — voting contest — privilege of designating recipient of gratuity — right to change mind. The immortal prerogative of woman to change her mind has been vindicated by the supreme court of New Brunswick in the case of *Murchie v. Mail Pub. Co.* 42 N. B. 36, the facts of which are as follows: A newspaper, for the purpose of increasing its circulation, instituted a voting contest, offering a free trip to Bermuda, Washington, and New York to five ladies to be elected by its subscribers, each of whom was permitted to cast a certain number of votes. The terms of the contest further provided that the lady who obtained the greatest number of all the votes cast had the right to choose the chaperon of the party. The plaintiff received the greatest number

and named a friend as chaperon, but thereafter hearing from her sister that she should like to go as chaperon, notified the person first designated and the newspaper that she had changed her mind. Then the difficulty commenced. The person first named naturally wished to go, and the matter was brought before the directors of the company owning the newspaper, a majority of whom thought that the person first designated should be the one to go. The plaintiff thereupon obtained an injunction restraining the delivery of a ticket to such person, and refused to accept a ticket tendered to her, and consequently did not make the trip. It was held that the naming of a chaperon was not in the nature of the execution of a power which was exhausted by its exercise, but was a right personal to the plaintiff; and therefore that the plaintiff was entitled to recover the value of a ticket and expenses incurred by her in preparing for the trip.

Contracts — statute of frauds — agreement to pay a greater rate of interest than stipulated in mortgage. An oral agreement by a mortgagor, after maturity of the mortgage obligation, to pay thereafter a rate of interest greater than that stipulated therein, in consideration of the mortgagee's forbearance to sue, is binding, and may be enforced by action thereon; although the statute of frauds prevents such increased interest from being made a charge on the land. *Standard Trusts Co. v. Hurst*, 24 Manitoba L. Rep. 185.

Sales — nondelivery — measure of damages — resale before time of delivery. That the rule that the damages to which a purchaser is entitled for nondelivery of goods is the difference between the contract price and the market price at the time when the goods should have been delivered is not affected by the fact that before the date of delivery the purchaser has resold the goods for less than the market price, is held by the House of Lords in *Williams Bros. v. E. T. Agius*, Lim. 83 L. J. K. B. N. S. 715.



Quaint and Curious



Strange all this difference should be.
—John Byrom

Eccentricities of Lawyer Novelist. Charles Reade's liberal drawings upon "authorities" in his passion for accuracy of detail gave rise to some foolish charges of plagiarism, particularly in the case of his masterpiece, "The Cloister and the Hearth." His reply to the charges was characteristic and clinching. "I milked 300 cows for it," said he, "but the cheese I made is mine."

For eccentricities Reade can claim a high place even among authors, few of whom are without their fads. He could not write away from his own room, with its innumerable volumes of cuttings and indexes, and he could not write well, he declared, except when standing up. He never took lunch, terming that meal "an insult to one's breakfast," detested soup and beef, preferred herring to every other fish, was a connoisseur of wine, but never touched spirits, and loathed the very smell of tobacco.—London Chronicle.

Chaucer's Lawyers. One of the most important of Chaucer's creations, from the legal point of view, is "the frankleyn." A frankleyn was a country gentleman, a freeholder, a squire, as we should say, and a power in the land where he dwelt. The frankleyn, whom the poet has drawn as a type of a great class, is, indeed, a jovial, free-living, free-handed, enviable old man. He was more than a rough and tumble country gentleman, however. He was learned in the law, and administered it; nay more, he had been Member of Parliament, and had helped to make the law:

"At sessions there was he, lord and sire,
Full often times he was knight of the shire;
An anelace and a gipciere all of silk,
Heng at his girdle, white as morwe milk.
A shereve had he ben, and a countour,
Was no wher swiche a worthy vavasour."

In the last line but one it will be noticed that he was a "countour." It is astonishing to notice the difficulty that this word has given so learned an editor as Tyrwhitt. As we have said above, the "contour" was the early form of barrister. A "counter" is a "countour," which is a translation from the Latin "narrator." "Matthew Paris, in his Life of John II., Abbot of St. Albans, which he wrote in 1255, 39 Hen. III., speaks of advocates at the common law, or countours (*quos banci narratores vulgariter appellamus*), as of an order of men well known:" (1 Bl. Com. 23, Coleridge's ed. note t).

We now pass to perhaps the most interesting of Chaucer's lawyers—the sergeant at law.

"A sergeant of the lawe ware and wise,
That often hadde yben at the paruis,
Ther was also, ful riche of excellence.
Discrete he was, and of gret reverence:
He semed swiche, his wordes were so wise.
Justice he was ful often in assise,
By patent, and by pleine commissioun;
For his science, and for his high renoun,
Of fees and robes had he many on."

(Prologue, line 311, et seq.)

The above quotation is a straightforward statement, the only word of any difficulty being "paruis." Selden tells us that the word means "an afternoon's exercise, or moot, for the instruction of young students, bearing the same name originally with the *parvisæ* at Oxford."

Possibly, therefore, the sergeant was a law lecturer or presided over legal discussions in the then important English Law School that Henry III. had brought together in London. As to his sitting as a justice, the statement bears out the knowledge that we have of the great weight attached to the opinions of a sergeant in Chaucer's time.

The next few lines are intensely interesting and somewhat difficult:

"In termes hadde he cas and domes alle,
That from the time of King Will. weren falle.
Therto he coude endite, and make a thing,
Ther coude no wight pinche at his writing.
And every statute coude he plaine by rote."

This seems to mean that the learned sergeant possessed and was well read in all the cases, both civil and criminal, that had been reported since the Conquest, and from his knowledge of them could give legal advice that was too sound to be caviled at; moreover, he knew every statute by heart.

The Queen's counsel of the present day is unlike the worthy sergeant in one thing, he does not know every statute by heart. So the worthy sergeant rode out with the rest of that merry company from the Tabard Inn at Southwark to Canterbury. Perhaps he joined them for safety on the way to the assize. It is possible that he was only holiday making in the Easter vacation; anyway, he went in humble guise.

"He rode but homely in a medlee cote,
Girt with a seint of silk, with barres smale."

It would be interesting to know if this man of law were a picture of one of the handful of accomplished lawyers who were at that time doing practically the whole of the work at Westminster.—*Law Times*.

Charles Lamb and the Temple. "I was born and passed the first seven years of my life in the Temple." With this simple preface, "the best loved of English writers," as Mr. Swinburne calls Charles Lamb, begins his famous essay on "The Old Benchers of the Inner Temple." Lamb was a true child of the Temple. He considered it "the most elegant spot

in the metropolis." He loved its "magnificent ample squares, its classic green recesses," and within its precincts he spent twenty-three years altogether, undoubtedly the happiest years of his life. Lamb must ever be an interesting figure to lawyers, not only because of his life-long connection with the Temple, but also because many of his best friends and closest associates were members of the legal profession.

The first seven years of Charles Lamb's life, as he tells us, were spent in the Temple; and we are to think of him at this time as a dreamy, dark-eyed boy, playing about the Temple courts with his sister, "astounding the young urchins, his contemporaries," by his manipulation of the fountain in Fountain-court, and no doubt wandering down at times to the garden-foot to watch the boats go by on his beloved river. His first school was in a little court off Fetter-lane, and very familiar to him must have been King's Bench-walk and Mitre-court and Fleet-street in those early days. It is not difficult to see why Charles Lamb loved the Temple. "A man would give something to have been born in such places." One day, long after Lamb had finally left the Temple, John Forster was asked by Mary Lamb to "go and look for Charles." He found him at Crown Office-row, looking up at the house where he was born:

"Ghost-like I paced round the haunts of my childhood,
Earth seems a desert I was bound to traverse."

Lamb came back to the Temple at the earliest opportunity. In 1801, nine years after the family had left Crown Office-row, he writes to Manning as follows: "I have partly fixed on most delectable rooms, which look out (when you stand on tiptoe) over the Thames and Surrey hills at the upper end of King's Bench-walk, Temple." This was No. 16, Mitre Court-buildings, where Lamb and his sister spent the next eight years. Mitre Court-buildings have been rebuilt, so that the chambers where the Lambs lived cannot now be identified. In 1809 they moved for a few months to a house in Southampton-buildings (on the site of the new Birbeck Bank) whence Charles

writes to Manning: "About the end of May, we remove to No. 4, Inner Temple-lane, where I mean to die. . . ." The next eight years (1809-1817) were probably the happiest in Charles Lamb's sad life. In the old chambers in Inner Temple-lane he gathered round him a brilliant circle of men who, like himself, acknowledge Samuel Taylor Coleridge as their master, and hailed Wordsworth as the rising sun.

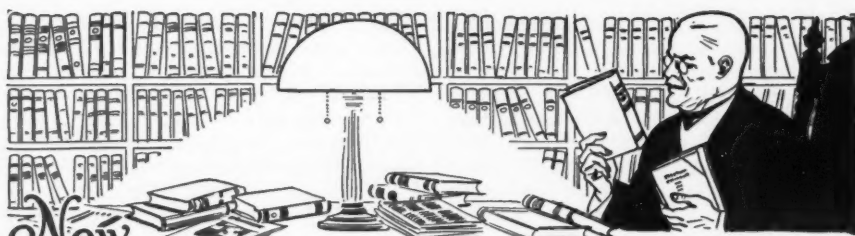
Charles Lamb's "Wednesday evenings" in Inner Temple-lane were almost as famous, in their way, as the contemporaneous gatherings at Holland House. If the latter could boast the presence and patronage of the great Macaulay, the former had the attraction of an occasional visit from Wordsworth and Coleridge. Besides these two great men—who only came at rare intervals, when they had a subduing effect on the merry party—the Inner Temple coterie included Hazlitt, Crabb, Robinson, Benjamin Haydon, Leigh Hunt, Thomas Noon Talfourd, the Lloyds, and several others. One who sometimes looked in was Wainwright, the poisoner, whose friendship with Charles Lamb was not the least curious incident in an extraordinary career. Lamb's informal invitation to these gatherings was good. "Swipes exactly at nine; punch to commence at ten *with argument*; difference of opinion expected to take place about eleven; perfect unanimity with some haziness and dimness about twelve." These *noctes ambrosianæ coenæque deum* have been well described by Hazlitt, Barry Cornwall, and Talfourd.

If Charles Lamb owed much to his early associations with the Temple and its lawyers, he has certainly paid the debt in full in that finest of all his essays, "The Old Benchers of the Inner Temple." In particular, he gives us a picture of the ancient terrace in the gardens in its palmy days, when "gods 'as old men covered with a mantle," in the shape of the Benchers of the Inn, used to stroll thereon in the morning hours. Curiously enough, none of the Benchers whom Lamb enumerates have come down to posterity as great lawyers. By a common

irony of fate, they survive, like the proverbial flies in amber, because the little dark-eyed boy who used to watch them from afar off thought fit in later years to "put them in an essay." Thomas Coventry, Samuel Salt, and the rest, apart from Lamb's mention of them, suggest nothing to us. Daines Barrington, of course, is known as the author of an almost forgotten book or two on legal subjects, and also as the correspondent of Gilbert White; Maseres, a prolific author of mathematical and historical works, and "omniscient Jackson," who was at one time M. P. for New Romney and Commissioner of the Treasury, are, alas! both covered with oblivion.—Law Times.

Thackeray's Relation to the Law and Lawyers. Thackeray's connection with the law and with lawyers began in the year 1831. After leaving Cambridge (without taking a degree), he traveled on the Continent for a few months, being rather undecided as to what profession he should adopt. At Weimar, where he met Goethe, he read a little civil law, which he "did not find much to his taste." Nevertheless, in obedience to the wishes of his friends, he decided to read for the bar, and, in November, 1831, he entered the chambers of one Taprell at No. 1, Hare-court, Temple, there to be initiated into the mysteries of special pleading.

Thackeray soon tired of special pleading. In a year or so he shook the dust of Taprell's chambers from off his feet, and went to Paris to study art. No one can regret Thackeray's rejection of the law as a profession. No doubt, with his faculty of clear vision and keen insight, he would have made an excellent judge, whose decisions would have been models of lucidity and style; but we have had many excellent judges, and—it is a truism, of course—only one "Vanity Fair." On the other hand, no one can regret the time spent by Thackeray in the chambers of the estimable Taprell. To it we owe that charming and unforgettable picture of Temple life which he has given us in the immortal pages of "Pendennis."—Law Times.



New Books and Recent Articles

Exhausting thought,
And hiving wisdom with each studious year.—Byron.

"Montgomery's Manual of Federal Procedure."
By Charles C. Montgomery of the Los Angeles, California, Bar. (Bancroft-Whitney Company, San Francisco, Cal.) \$6.50 delivered.

This volume will be of great value to the Federal practitioner. It is a triumph of modern bookmaking. There are 1050 pages, printed on Bible paper and bound in morocco with flexible cover—embracing a mass of information which would formerly have required a large volume to contain it,—yet in this form so small as to be readily carried in the pocket.

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The work contains many explanatory sec-

tions, accompanied with citations of authorities, which are placed in juxtaposition to the statutory provisions on the same subject.

The forms are scattered through the book in connection with the laws or rules on which they are based.

The appendix contains the Judicial Code, the rules of the Supreme Court and Circuit Court, the rules in Admiralty and the Equity Rules. All these are quoted in the text where necessary, such references being shown by annotation, which also includes citations of statutes and authorities. The annotations throughout the volume will be useful in working out some of the finer points of practice, the manual being designed as a guide book rather than an exhaustive treatise.

The changes made in the law render such a work as this a great convenience, if not a necessity.

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"Address on Responsibility of the Lawyer."—46 Chicago Legal News, 380.

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"Among Caribbean Devils and Duppies."—The Century, July, 1914, p. 446.

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"Forgery Detection or Thumbnail Hints on Signature Recognition."—21 Case and Comment, 111.

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"Fraud in One of Its Many Phases: Representation in Regard to a Material Fact."—22 Law Student's Helper, 11.

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"The Graft Investigations of a Year."—3 National Municipal Review, 525.

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"Conflict of Jurisdiction Over Highways."—21 Case and Comment, 91.

"Use of Highways by Heavily Loaded Vehicles or Traction Engines."—21 Case and Comment, 133.

"Frightening Horses on Highways."—21 Case and Comment, 97.

"The Lincoln Highway."—21 Case and Comment, 108.

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Law Merchant.

"The Law Merchant and California Decisions."—2 California Law Review, 377.

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"Rules of the French Law in Regard to the Marriage of French Citizens in a Foreign Country."—21 Case and Comment, 117.

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"Inconsistent Verdict in an Action Against a Master and His Servant, or a Corporation and Its Agent."—79 Central Law Journal, 4.

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"The Present Position of the Monroe Doctrine."—9 Bench and Bar, N. S., 18.

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"Pittsburgh's Hump."—3 National Municipal Review, 547.

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"Spendthrift Trusts in New York, Needed Reforms in the Law."—9 Bench and Bar, N. S., 6, 59.

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"The Economical Use of Water as Affecting the Extent of Rights under the Doctrine of Prior Appropriation."—2 California Law Review, 367.

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The People and the Courts.

Our people, as pure at heart as any that ever lived, are thoughtlessly beginning an assault upon the only agency that distributes the life blood of all governments. Let history bear evidence. England can trace the elements of her greatness in Magna Charta, for it was then that the courts threw off the yoke of King John and the Crown and became independent. This was almost the direct result of the missionary work of Sir John Fitz Walter, inspired by the murder of his daughter Matilda ("Maid Marion"), as the leader of the Barons up to the capitulation at Runnymede. In England's courts afterwards lay her power, in reverence she found her strength, and the people their contentment and happiness, although at the cost of many a life and fortune and dark hours of despair. From the school of her common-law procedure have graduated the legal giants of history, who spread the light of civilization and culture into a then darkened world. From her inns of court, established for the purpose, came forth a body of law and a citizenship by whose example we well may profit, and that has helped to uplift mankind. The people were educated to fit the law, and not the law the whims of the people. The animal spirit of man became disciplined and fitted for government. Man was not exalted above the law, whether prince or peasant. The King himself bowed before its majesty and power. In Rome the justly famous Justinian Code, more than a century in its making, is the distinguishing feature of the first half of the sixth century of the Christian era. In France, the mighty warrior, Napoleon, reaching the pinnacle of fame by the sword, declared that his memory would eventually be commemorated through his Civil Code. Wherever the principles of justice are sought, the name of Moses is not forgotten. And, lest we forget, while the greatness that was Rome's lay in the perfection of her courts, for they were models for the world, when the finger of the prince was permitted to rest upon the hand of the judge when he signed a decree, the decadence of the empire began. And it matters not whether that interference be by the prince or the people, the result will be the same. What the Englishman demanded from the Crown at Runnymede, the Roman surrendered to the prince; the one became a conqueror and the mistress of the seas, the other the conquered and a byword.—Thomas W. Shelton, in Address before Tennessee Bar Association.



Judges and Lawyers

A Record of Bench and Bar

Hon. Charles Sumner Lobingier

Judge of U. S. District Court in Orient

THE new judge of the United States District Court for China is Honorable Charles S. Lobingier, who goes to that position after a service of ten years as judge of the Court of First Instance of the Philippine Islands.

At the banquet tendered Judge Lobingier by the members of the Manila bar, on the occasion of his retirement, resolutions were adopted reciting his long service in the courts of the islands "with conspicuous ability and in the enlarged spirit of an upright judge inspired by an innate sense of justice and enlightened by extensive learning," and it was resolved that while the bar "recognize the eminent fitness of Judge Lobingier's selection as the sole judicial representative of the United States

in the Republic of China, we deplore the loss thereby occasioned to these islands, and regret the severance of our professional and personal relations with him, and hereby extend our best wishes for his welfare wherever the paths of duty may lead him."

Honorable C. S. Arellano, Chief Justice of the Supreme Court of the Philippine Islands, wrote: "While, on the one hand, I regret that you are severing your connection with the judiciary of the Philippines, yet, on the other, it can only be a matter of congratulation that you have merited at the hands of the President of the United States an appointment conferring so much honor as that to the bench at Shanghai. It is a great pleasure to me to tell you



JUDGE LOBINGIER

how estimable and commendable are the qualities of zeal, intelligence, and rectitude which you have brought to the exercise of your judicial functions, and of the reputation you enjoy as a jurist by reason of your legal works. I trust they will prove to be a happy augury of still greater successes in your new position."

These cordial commendations were supplemented by a hearty welcome on the occasion of Judge Lobingier's first public appearance on the bench of the United States District Court at Shanghai. Mr. S. Fessenden announced the desire of the local bar to render all possible assistance to facilitate the administration of justice, and expressed the hope that Judge Lobingier's sojourn on the bench would be a very long and pleasant one.

Judge Lobingier practised at the Omaha bar for ten years before going to the Philippines. He was for a time a member of the Nebraska Supreme Court Commission, and wrote some notable opinions, several of which were selected for inclusion in the L.R.A. series of reports.

He has been a prolific writer upon legal topics and a contributor to many American and European magazines. His writings on Stock and Stockholders, Constitutional Law, Equity, Foreclosure, Insurance, Evidence, Philippine Practice, The People's Law and Territories are familiar to the profession, as well as his work as a member of the editorial staff of the Comparative Law Bureau.

When in the United States last autumn, Judge Lobingier delivered a series of eleven lectures at the University of California on the subject of Spanish law and its practice in the American possessions.

The court over which Judge Lobingier has been called to preside is one of great international importance. It was created by Congress in 1905, with the consent of the Chinese government. It takes cognizance of all cases of importance between American citizens in China and subjects of China; of certain classes of crimes charged against or committed against Americans, and of civil cases where the litigants on both sides are American citizens.

The importance of this court is constantly increasing with the growth of the

American population in the Orient. It is a matter for congratulation that it has as its head so talented an American lawyer.

Death of Judge Hornblower.

William Butler Hornblower, Associate Judge of the New York Court of Appeals, died on June 16. He was born in Paterson, New Jersey, and was sixty-four years old. He came of distinguished ancestry.

During his youthful days of development he was under the immediate influence of a learned father and of two distinguished uncles, Judge Woodruff and Justice Joseph P. Bradley, of the United States Supreme Court.

While at college he became deeply interested in constitutional law, his attention being drawn to it by the discussions over the impeachment of President Johnson and by the laws passed by Congress during the reconstruction period. His studies led him to change from the political faith in which he had been brought up, and he became a Democrat.

Two years after entering the offices of Carter & Eaton he was made a member of the firm. The senior members were averse to trying cases in court, and Judge Hornblower was delegated to take care of this end of the business.

In 1904 Judge Hornblower was elected president of the New York Bar Association, and the legislature appointed him a member of the board of statutory consolidation, which examined and revised all the general laws of the state from the year 1777, and reported to the legislature in 1909 the consolidated laws, which comprise the entire laws of the state up to that year.

Grover Cleveland, when President, appointed Mr. Hornblower to the Supreme Court of the United States, but because of a factional fight in the United States Senate, the nominee failed of confirmation.

In 1907 Judge Hornblower formed the law firm of Hornblower, Miller, & Potter of 25 Broad street, New York city. He withdrew from the firm when Gov. Glynn appointed him an associate judge of the court of appeals, on February 2 of this year.

Gilbert Ray Hawes

The Torrens Title Lawyer

MR. HAWES has been a member of the New York city bar since 1878. For over thirty years, and up to the time of the fire in January, 1912, he had an office in the Equitable Building. All his books, papers, and records were destroyed in the conflagration, but, undismayed by the misfortune, he at once secured new offices and continued his professional labors.

He has been counsel in numerous cases, including litigation over Wagner's "Parsifal" and Biondi's "Saturnalia."

While prominent as attorney or counsel in corporation and real estate litigations, he is especially known from his earnest advocacy of the Torrens Land Title Registration System. He was active in securing the passage in New York of legislation along this line. First came the law of 1907, which authorized Governor Hughes to appoint a commission of experts to examine and report on the question of land transfer. Then came the report in favor of the Torrens system. Then came the Torrens land title registration law, otherwise known as article 12 of the real property law, enacted in May, 1908, but which did not go into effect until February, 1909. Then came the amendments to the law,

in order to make the same more practical and effectual, known as chapter 627 of the Laws of 1910. All this required tremendous work and effort against the fiercest kind of opposition.

The practice and procedure under the

Torrens law has been settled by a series of test cases, and the constitutionality of its provisions has been upheld by the courts. Among the cases in which Mr. Hawes was attorney or counsel for the plaintiff owner seeking registration of title may be mentioned: *Smith v. Martin*, 69 Misc. 108, 124 N. Y. Supp. 1064, 142 App. Div. 60, 126 N. Y. Supp. 877; *Hawes v. United States Trust Co.* 142 App. Div. 789, 127 N. Y. Supp. 632; *Sunderman v. People*, 130 N. Y. Supp. 453, 148 App. Div. 124, 132 N.



GILBERT R. HAWES

Y. Supp. 68; *City & Suburban Homes Co. v. People*, 148 App. Div. 920, 132 N. Y. Supp. 1124; *Partenfelder v. People* argued before Court of Appeals, March, 1914; *Sundermann v. People*, New York Law Journal, March 17, 1913.

An interesting tale is interwoven with the Torrens registration action of Catherine Meighan v. Lillie Rohe, et al. About seventy-five years ago two young German lads left the little town of their birth, in Westphalia, and came as emi-

grants to America. They landed in New York city at the Battery (there was no Ellis Island then), and started out to make their fortunes. One of these boys was Peter Wurm and the other was Peter Bieckner.

After various vicissitudes they succeeded in certain business ventures in which they were jointly interested, and, being of frugal and saving habits, slowly accumulated a few hundred dollars. Looking around for some safe place in which to invest their surplus cash, their attention was directed to what was then a rural farming district in Westchester county, beyond the confines of the city, consisting of woods, pastures, and cultivated fields, through which ran a purling stream, known as Mill brook. There they purchased a piece of ground and built them a modest house on what is now Third avenue, between One Hundred and Fifty-second and One Hundred and Fifty-third streets, extending to Bergen (formerly Brook) avenue, in what was afterwards known as the "annexed district" and recently the county of the Bronx.

Both were enamored of the same damsel, but Peter Biecker proved to be the more ardent wooer, so that he won the prize of love, while Peter Wurm remained a bachelor to the day of his death. These two Peters were like David and Jonathan of old, and had the utmost confidence in each other. So it came to pass that when this property was bought, although Peter Biecker paid the greater part of the purchase price and subsequent taxes and cost of improvements, he insisted that the deed should be made out in the name of his old friend, Peter Wurm, as a sort of consolation prize, in view of his matrimonial disappointment. The married Peter then moved into the new house, with his growing family, and entertained therein the bachelor Peter, as an honored guest.

Thus life flowed along smoothly and happily for all until the year 1852. Then, the Bachelor Peter, anxious to see more of the world, and overcome by a feeling of "wanderlust," decided to start on his travels for distant lands. All the arguments and entreaties of the married Peter

and his good frau failed to dissuade him from his set purpose. He announced that he intended to go first to New Orleans and then to Mexico and South America. Before leaving, however, he drafted a long letter or document, written in quaint old German, expressing his deep gratitude for all favors received, and stating that, in case of his death or failure to return within ten years, this land with the house on it should become the property of his life-long and devoted friend, Peter Biecker, whom he nominated as his sole heir at law.

From that day in 1852, down to the present time, nothing has been heard of or from Peter Wurm, although persistent inquiries were made at New Orleans and other places where it was supposed that he might be found. In the meantime Peter Biecker and his wife both died, leaving as the sole surviving heir, his daughter Catherine, now a widow with two children. She had numerous opportunities to sell the property for many thousands of dollars, but on each occasion the prospective purchaser was informed by one of the old title insurance companies that the title was bad and unmarketable, and that the defect could never be cured, because of the uncertainty of whether or not Peter Wurm was dead, and, if dead, whether he had left any issue or heirs at law surviving him.

The owner consulted Mr. Hawes, who, after a contested trial, secured a final judgment and decree of registration, whereby an absolutely indefeasible title in fee simple has been vested by the state, thus removing all clouds and creating a good and marketable title, which the purchaser must accept.

Mr. Hawes claims this is only a fair example of the peculiar advantages and benefits of the Torrens law.

He has delivered many lectures on both legal and general subjects. He has written well-known treatises on the Torrens System and Title Insurance. His article on Land Title Registration, which appeared in April, 1913, will be remembered by the readers of CASE AND COMMENT.



Who mix'd reason with pleasure, and wisdom with mirth.—Goldsmith.

Facts Versus Fancies. Richard LeGalliene was sympathizing with a young writer whose book of poetry had been refused by twelve publishers.

"Real lovers of poetry," said Mr. Le Galliene, "are unfortunately becoming rare. Too many people nowadays are like the judge.

"This judge was recommended by a poetic friend to read Shelley. The great man of the law said he supposed he ought to read a little poetry, and, having heard so much of Shelley, he would try him.

"And what do you think of it?" said his friend to the judge after he had waded through a few pages of 'Epipsychidion.' 'Isn't it beautiful?'

"Well, well—oh, yes—I dare say it is," said the judge, "but what I want to know is, when are we going to get at the facts?"—Washington Star.

Riley and "Them Irish." An Indianapolis lawyer with a friend motored down to Greenfield, Indiana, the birthplace of James Whitcomb Riley, the Hoosier poet. They had dinner at the hotel and thought they would like to see the house where Riley lived. So they asked the hotel man:

"Where is the Riley house?"

"I don't know any hotel by that name," he replied, "though there may be some such boarding house here."

"I mean the James Whitcomb Riley house," said the lawyer, thinking his host had misunderstood.

"I don't know him; you may be able to find his name in the city directory."

"I guess he's moved," said the lawyer.

"Probably," the hotel keeper comment-

ed. "Some of them Irish don't stay long in a place."—New York Sun.

Want Simple English. "Yes," said the earnest professor, "what we want in literature is direct and simple English."

The listeners gravely nodded.

"Direct and simple," they echoed.

"Those conglomerated effusions of vapid intellects," the professor went on, "which posed in lamentable attitudes as the emotional and intellectual ingredients of fictional realism, fall far short of the obvious requirements of contemporary demands and violate the traditional models of the transcendent minds of the Elizabethan era of glorious memory. Plain and simple English is the demand of the hour."

Whereupon everybody applauded and went home.—Cleveland Plain Dealer.

Balzac in Wall Street. Two stock traders, sitting in a customers' room in a brokerage house in Wall street, were discussing the various authors.

"I think," said the first trader, "that Balzac was the most forceful writer. He is my favorite author."

The second trader started in to criticize some of the Balzac works and boost those of some other writers. A general argument was under way when a third party entered the door, a gentleman known for shrewd investments.

"Ah, here comes Jones," said the first trader; "we'll leave the question to him." Then: "Hello, Jones. Say, I was just boosting Balzac, and our friend here has taken the other side. Now we're going to leave it to you. What's your opinion?"

Jones's face took on a puzzled expression, and, with his thumbs placed under his arm pits, he answered: "You've got the wrong party, boys, I never bought a share of mining stock in my life."—*Popular Magazine*.

Treason. Fogg reports that he overheard this in the book department of one of our big stores:

Customer—"Have you Arnold's poems?"

Sales girl (turning to head of department)—"Miss Simpson, have we Benedict Arnold's poems?"—*Boston Transcript*.

A Deed Without a Name. A barrister noted for absence of mind was once witnessing the representation of "Macbeth," and on the witches replying to the Thane's inquiry that they were "doing a deed without a name," catching the sound of the words, he started up, exclaiming to the astonishment of the audience, "A deed without a name. Why, it's void; it is not worth sixpence."

A Good Listener. Magistrate: "I understand that you overheard the quarrel between this defendant and his wife."

Witness: "Yes, sor."

Magistrate: "Tell the court, if you can, what he seemed to be doing."

Witness: "He seemed to be doin' the listenin'."

A Little Mixed. A very worthy and pious old dame had several books lent to her which she could not read, so she got a little girl to read to her. The curate of the church lent her "Pilgrim's Progress," and a nephew a copy of "Robinson Crusoe." Having read them alternately, the dame got the text a little mixed up, and when the curate called upon her, and asked how she liked "Pilgrim's Progress," he was somewhat surprised when she replied:

"It's a marvelous book, truly; why, what big troubles him and his man Friday undergone."

The Exact Figures. There was tried before a judge of a circuit court a case growing out of damages resulting from a fire which had originated in an im-

mense oil tank. During the fire a large amount of property was destroyed.

Among the witnesses was one of the men who had been in charge of the tank. He had given his testimony, and the lawyer for the prosecution was cross-examining him.

"Your name, I think you said, is Blink-inhorn?"

"Yes, sir."

"You were one of the men employed to take care of the tank in question, were you not?"

"Kinder so."

"In what capacity?"

The witness struggled a moment with the question.

"Capacity?" he asked.

"Yes."

"I reckon about twenty thousand gallons," answered the witness.

Dangerous Friction. Among those called to the stand in a case recently tried in an Ohio court was an insurance adjuster, who had been sent by his company to adjust the loss of a building which figured in this suit.

"How did the fire start?" demanded the attorney for the other side, fixing a stern eye on the witness.

"I couldn't say certainly," said the adjuster, "and nobody seemed able to tell; but it struck me that it might have been the result of friction."

"What do you mean by that?" demanded the attorney.

"Well," said the adjuster, gravely, "friction sometimes comes from rubbing a \$10,000 policy on a \$5,000 building."

The Theology of a Poet. Burns being in church on Sunday, and having some difficulty in procuring a seat, a young lady who perceived him kindly made way for him in her pew. The text was on the terrors of the Gospel, as denounced against sinners, to prove which the preacher referred to several passages of Scripture, to all of which the lady seemed attentive and somewhat agitated. Burns, on perceiving this, wrote with a pencil, on the blank leaf of her Bible the following lines:

Fair maid, you need not take a hint,
Nor idle texts pursue;
'Twas only sinners that he meant,
Not angels such as you.

